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IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY,

Petitioners,

v.

JULIE WILLES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals erred in interpreting key statutory terms in the definition of "adverse action" in the Fair Credit Reporting Act, 15 U.S.C. §1681a(k)(1)(B)(i), so as to expand the reach of that definition far beyond its plain meaning, thus substantially increasing the statutory obligations on insurance companies to notify consumers of purported "adverse actions" and creating vastly expanded potential liabilities under the statute?

2. Whether the Ninth Circuit Court of Appeals erred in holding that "willful noncompliance" under section 1681n of the Fair Credit Reporting Act, 15 U.S.C. § 1681n, encompasses "reckless disregard" for the requirements of the Act, a holding that directly conflicts with the holdings of other Courts of Appeals, which have required knowledge that the conduct at issue did not comply with the Act?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner State Farm Mutual Automobile Insurance Company is a mutual insurance company and does not issue stock. It has no parent company.

Petitioner State Farm Fire and Casualty Company is a wholly-owned subsidiary of Petitioner State Farm Mutual Automobile Insurance Company.

Respondent Julie Willes is an individual.

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Petitioners State Farm Mutual Automobile Insurance Company ("State Farm Mutual") and State Farm Fire and Casualty Company ("State Farm Fire") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinions of the United States District Court for the District of Oregon (Pet. App. 60-76) have not been officially reported. The opinion of the United States Court of Appeals in this case (Pet. App. 23-24), which has not been selected for publication in the Federal Reporter, is available in the Federal Appendix, 143 Fed. App'x. 64. The consolidated opinion of the Court of Appeals in *Edo v. GEICO Casualty Co.* and *Reynolds v. Hartford Financial Services Group, Inc.* (Pet. App. 25-57), which is incorporated into the Court's opinion in this case, is reported at 435 F.3d 1081.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 2005. State Farm Mutual and State Farm Fire's timely petition for rehearing and rehearing en banc was denied on April 20, 2006. (Pet. App. 58-59). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1681a, 1681b, 1681n, and 1681o of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681a, 1681b, 1681n, 1681o, are reproduced at Pet. App. 1-22.

STATEMENT OF THE CASE

Background

The FCRA is intended to ensure the accuracy and fairness of consumer credit reporting through regulation of both consumer reporting agencies and users of consumer reports, including insurance companies. 15 U.S.C. §§ 1681(a), (b). The FCRA permits insurance companies to obtain consumer

credit information for use in connection with the underwriting of insurance. 15 U.S.C. §1681b(a)(3)(C). If, however, an insurance company takes an "adverse action," as defined in the statute, based upon information in a consumer report, the company is required to notify the consumer of the adverse action. 15 U.S.C. §1681m. In the context of insurance, an "adverse action" is defined as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. §1681a(k)(1)(B)(i).

This case is one of eight class action lawsuits filed against automobile, homeowners, and other insurance companies in the United States District Court for the District of Oregon. Each lawsuit alleges that the insurance company defendant "willfully" violated the FCRA in transactions with the named plaintiffs and putative class members nationwide, by failing to provide notice of "adverse actions" allegedly taken by the companies based upon their credit histories. The lawsuits seek statutory damages of $100 to $1000 for each putative class member, punitive damages and attorneys' fees.

Plaintiff Julie Willes' action against Petitioners State Farm Fire and State Farm Mutual arose from Ms. Willes' visit on August 1, 2001 to a local State Farm insurance agency to obtain a quote for automobile insurance. During that visit, Ms. Willes was offered a quote for automobile insurance from State Farm Fire. Ms. Willes applied for State Farm Fire insurance for her three cars.

The insurance agent had a preliminary conversation with Ms. Willes in which the agent obtained from Ms. Willes the basic background information needed to prepare a quote, including Ms. Willes' driving history.[1] Ms. Willes informed

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[1] State Farm insurance agents prepare quotes using a computerized system called "Echo Quote." As a preliminary step, the agent must decide whether to prepare a quote for insurance with State Farm Mutual or to prepare a quote for insurance with State Farm Fire. Both the agent's decision as to which company to choose and the initial quote itself are based upon information learned from the driver in a preliminary oral

the agent that she had received a speeding ticket within the past thirty-six months.

State Farm Mutual and State Farm Fire are separate insurance companies that each offer automobile insurance policies at potentially different rates. Each company has its own threshold eligibility requirements. Among State Farm Mutual's threshold requirements is that the driver have no accidents or moving violations within the prior thirty-six months. Although some of these eligibility requirements can be waived by State Farm Mutual, an individual who fails to meet such requirements is presumptively ineligible for coverage from State Farm Mutual.

Based on Ms. Willes' revelation that she had received a speeding ticket within the prior thirty-six months, the insurance agent prepared a quote for insurance from State Farm Fire, not State Farm Mutual. No quote for State Farm Mutual insurance was ever prepared for Ms. Willes. Ms. Willes directed the insurance agent to prepare applications for the quoted State Farm Fire insurance for each of her three cars. Ms. Willes signed the three applications, and the applications were submitted for underwriting.

Not until after the quote had been given to Ms. Willes and she had directed the agent to prepare the insurance applications was any information from a credit or consumer report accessed. At that time, as part of the application process for the State Farm Fire insurance, State Farm's on-line automated underwriting information or "AUI" system generated an "underwriting score" for Ms. Willes. That underwriting score was based in part upon Ms. Willes' driving record and insurance claims history and in part upon her credit history and other pertinent information. If Ms. Willes' underwriting score had been sufficiently high, Ms. Willes might have qualified for an exception to State Farm Mutual's threshold eligibility requirements despite her

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conversation. Neither is based on the consumer's credit information or on any consumer report as defined by the FCRA. Thus, under State Farm's procedures, the decision as to which company's insurance a consumer is eligible for is made prior to the submission of an application for insurance and prior to the use of any credit information.

speeding ticket, and might have been offered policies with State Farm Mutual. Her score was not sufficiently favorable to qualify for the exception. Ms. Willes' applications with State Farm Fire were approved, and insurance policies were issued at the rates that had been quoted to her without reference to any credit information or other consumer report.

Ms. Willes brought suit against both State Farm Fire and State Farm Mutual, asserting that both of the two companies had willfully violated the FCRA by failing to notify her of a purported "adverse action," namely, that she was not offered a State Farm Mutual policy, due in part, she claims, to information contained in her credit report. Ms. Willes' Complaint seeks recovery on behalf of herself and a putative nationwide class.

The District Court's Grant of Summary Judgment in Favor of State Farm Fire and State Farm Mutual

The District Court (Anna J. Brown, J.) granted summary judgments in favor of both State Farm Fire and State Farm Mutual, holding that neither company had taken an adverse action within the meaning of the FCRA and that therefore neither company was required by the statute to provide notice to Ms. Willes. In the case of State Farm Fire, the District Court concluded that an "insurer cannot 'reduce' or 'unfavorably or adversely change' the terms of insurance unless such terms previously existed and the insurer subsequently altered those terms in an unfavorable manner." Pet. App. 62. Accordingly, the court ruled that State Farm Fire's "initial setting of [Ms. Willes'] insurance premiums did not constitute 'adverse actions' under FCRA." Pet. App. 63. The District Court acknowledged that the initial setting of Ms. Willes' State Farm Fire premium was not based upon her credit information. Pet. App. 62-63.

The District Court rejected Ms. Willes' assertion that "she applied for and was denied an automobile insurance policy with [State Farm] Mutual because of information relating to her credit history contained in a consumer credit report." Pet. App. 72-73. Because the FCRA defines an adverse action in the insurance context as an action adversely affecting the consumer with regard to "insurance, existing or applied for,"

15 U.S.C. § 1681a(k)(1)(B)(i), the court reasoned that the threshold issue presented by Ms. Willes' claims against State Farm Mutual was "whether Willes applied for automobile insurance with Mutual." Pet. App. 73. The court explained that "Willes characterizes the application process as one in which the agent 'submitted her [qualifying] information to the [State Farm automated underwriting system] . . . to determine whether plaintiff should be written in State Farm Mutual or State Farm Fire'" and that on that basis Ms. Willes claimed that an "'application was made to both companies.'" Pet. App. 74. Rejecting Ms. Willes' contentions, the District Court found that Ms. Willes

> made only one application for insurance, and that application was directed to Fire & Casualty. The State Farm agent who Willes contacted made the initial determination, without regard to credit history, that Willes did not qualify for the Mutual policy because of her driving record. The agent submitted a request for a quote to Fire & Casualty only. Fire & Casualty responded with a quote. Willes then submitted applications on each of her automobiles to Fire & Casualty. Mutual, via the AUI [Automated Underwriting] system, could have created an exception to Mutual's underwriting guidelines during the pre-application process depending on Willes's credit score. At the time the AUI system indicated Mutual would not make an exception in Willes's case, however, Willes had not requested insurance with Mutual and the State Farm agent had requested a quote from Fire & Casualty only.

Pet. App. 74. Thus, the District Court rejected Ms. Willes' contention that she had "applied for" insurance with State Farm Mutual, noting that "Willes' hope to obtain the best coverage available is too generic to be an 'application' for insurance with Mutual." Pet. App. 75. The District Court did not reach the issue of willfulness with respect to either State Farm Fire or State Farm Mutual.

The Ninth Circuit's Decision in Willes

The Ninth Circuit reversed the District Court's grants of summary judgment in favor of State Farm Fire and State Farm Mutual based upon its consolidated decision in two related cases, *Edo v. GEICO Casualty Co.* and *Reynolds v. Hartford Financial Services Group* (hereinafter, "*Reynolds*"). In light of *Reynolds*, which was issued on the same day as and incorporated into its decision in this case, the Ninth Circuit rejected the District Court's ruling with regard to State Farm Fire that in cases involving an initial policy of insurance, an "'increase[] in any charge' cannot occur 'unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report.'" Pet. App. 24. With regard to State Farm Mutual, the Ninth Circuit stated:

> [T]he district court reasoned that although State Farm Mutual Automobile Insurance Company denied Willes a policy based on his [*sic*] credit information and made the decision that he [*sic*] would be charged an increased rate, Mutual was not liable because Willes "did not apply for and was not denied insurance coverage by Mutual within the meaning of FCRA." Again, we reverse, in light of [*Reynolds*].

Pet. App. 24. The court, not reaching the issue of willfulness, "remand[ed] these and all remaining issues to the district court for consideration in light of [*Reynolds*]." Pet. App. 24.

State Farm Fire and State Farm Mutual filed three petitions and amended petitions for rehearing and for rehearing en banc, which were denied by the Ninth Circuit on April 20, 2006. Pet. App. 58-59.

The Ninth Circuit's Consolidated Decision in Reynolds

As noted above, the Ninth Circuit's decision in *Willes* was issued on the same day as and incorporated the holdings of the Ninth Circuit's consolidated decision in *Reynolds*.[2] Three

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[2] The Ninth Circuit issued its original opinion in *Reynolds* on August 4, 2005, but subsequently amended that decision twice. *See* 416 F.3d 1097

other cases against other insurance companies, all originating in the Oregon District Court, were decided on the same day as *Willes*, and the consolidated opinion in *Reynolds* formed the basis of the Ninth Circuit's reversals of summary judgment in those cases as well.

In *Reynolds*, the Ninth Circuit adopted a broad reading of the FCRA's statutory definition of an adverse action in connection with the underwriting of insurance. The court held that in the insurance context an adverse action in the form of a price increase occurs "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged." Pet. App. 42. Furthermore, the court held that there is an increase within the meaning of the statute "whenever a consumer pays a higher rate because his credit rating is less than the top potential score." Pet. App. 43. The court stated that, "[i]n other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him." Pet. App. 43-44.[3]

In addition, the Ninth Circuit rejected the contention that the FCRA's use of the term "insurance . . . applied for" limited the statute to circumstances where a consumer actually submitted an application for insurance. Instead, the Ninth Circuit held that making a general request for insurance constituted applying for insurance within the meaning of the FCRA. Pet. App. 48-49. Based upon its broad interpretation of "applied for," the Ninth Circuit also held that an adverse action occurs where a consumer applies for insurance with a family of companies and is offered insurance with one of the companies at less than the best price offered by any of the companies and that in such

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(9th Cir.), *superseded by* 426 F.3d 1020 (9th Cir. 2005), *superseded by* 435 F.3d 1081 (9th Cir. 2006). References herein to *Reynolds* are to the Ninth Circuit's 2006 opinion, unless otherwise specified. The 2006 opinion is reproduced at Pet. App. 25-57.

[3] As noted above, credit information is only one component of the information used to generate the "underwriting score" at issue in this case. *See supra* at 3.

circumstances two or more companies may be jointly and severally liable. Pet. App. 43-44, 48-51.

Addressing civil liability for willful noncompliance with the FCRA, the Ninth Circuit followed the Third Circuit in holding that willful noncompliance with the requirements of the Act includes not only a knowing and intentional failure to comply, but also "reckless disregard" of the rights of consumers under the FCRA. The Ninth Circuit acknowledged that the willfulness standard it adopted conflicts with the standard adopted by other Circuits, including the Sixth and Eighth. Pet. App. 54 n.17. The Ninth Circuit further ruled that a company's reliance upon an "implausible" interpretation of the statute, even in matters of first impression and even with advice of counsel, could support a finding of willful noncompliance. Pet. App. 55.

Pursuant to these rulings, the Ninth Circuit found that State Farm Fire and State Farm Mutual could both be liable to Ms. Willes, despite the fact that State Farm Fire issued Ms. Willes insurance policies at the price it quoted to her without reference to any consumer report and despite the fact that consideration of Ms. Willes' underwriting score did not result in any change in the initial determination that Ms. Willes was not eligible for a State Farm Mutual policy.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decisions drastically expand the obligations and potential liability imposed upon insurance companies and other businesses under the FCRA. The court's interpretation of the FCRA's definition of "adverse action" directly contravenes the plain language of the statute and raises important questions of statutory construction that should be resolved by this Court. In addition, for purposes of the civil penalties provisions of the FCRA, the Ninth Circuit erroneously interpreted "willful" noncompliance with the requirements of the statute as including reckless disregard – an interpretation rejected by the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits. Because a finding of "willful" non-compliance with the statute permits the award of statutory damages, punitive damages and attorney's fees, the Ninth Circuit's relaxation of the willfulness

standard, if allowed to stand, will improperly subject companies to enormous potential liability. The impact and importance of this issue and the conflict among the Courts of Appeals warrant this Court's intervention.

Under the FCRA, it is a permissible practice for insurance companies to consider a consumer's credit history or other consumer information in making underwriting decisions as to whether to insure a particular risk and at what price. *See* 15 U.S.C. § 1681b(a)(3)(C). However, an insurer who takes an "adverse action" as defined by the FCRA is obliged to notify the affected consumer. The statutory definition of "adverse action" limits the FCRA's notice requirements to unfavorable actions taken with regard to insurance that is "existing" or "applied for." Under the Ninth Circuit's ruling, "applied for" includes an ill defined range of actions connected to a consumer's request for information regarding policies available and the prices of coverage. Thus, for example, under the Ninth Circuit's interpretation of the words "applied for," a consumer who submits an application for insurance to a particular company of an affiliated group of companies may be deemed to have "applied for" insurance with the other companies in the affiliated group. The supposedly "applied for" insurance is then deemed to have been denied, and if that insurance would or might have been less expensive than the insurance the consumer actually applied for, an "increase" in the charge for the consumer's insurance is deemed to have occurred, triggering an obligation to give notice. The Ninth Circuit's interpretation is contrary to the ordinary and natural meaning of the words "applied for" in the context of insurance.

The drastic expansion of the notice obligation resulting from the Ninth Circuit's interpretation of the words "applied for" is illustrated by its reversal of summary judgment in favor of State Farm Mutual. When Plaintiff first inquired about State Farm insurance, the agent determined that, based on information about her driving record which Plaintiff herself supplied, Plaintiff was not eligible for State Farm Mutual insurance and provided Plaintiff with quotes for State Farm Fire policies. Plaintiff signed and submitted three applications for State Farm Fire insurance. In the application

process, when Plaintiff's underwriting score (based partly on her credit history) was accessed, it was again determined that Plaintiff was not eligible to apply for a State Farm Mutual policy. Plaintiff never asked for State Farm Mutual insurance, was never quoted a price for State Farm Mutual insurance and did not submit applications for State Farm Mutual insurance. Yet, according to the Ninth Circuit's interpretation of the statutory definition of "adverse action," Plaintiff "applied for" State Farm Mutual insurance and was "denied" based upon her credit history.

The Ninth Circuit also erred in holding that the phrase "increase in any charge for" encompasses any initial purchase of insurance where a consumer is charged a rate that is more than the rate he or she would have paid if his or her credit score had been perfect. In the present case, the Ninth Circuit simply disregarded the fact that Plaintiff's premium was initially determined *without* reference to any consumer report and was not subsequently raised. The Ninth Circuit held that both State Farm Fire and State Farm Mutual could be liable based upon the purported increase in the premium that might hypothetically have been available if Plaintiff had been eligible to apply for State Farm Mutual insurance. The Ninth Circuit likewise disregarded the crucial fact that the initial determination that Plaintiff was not eligible for State Farm Mutual insurance was also made *without* consideration of any consumer report and that Plaintiff's underwriting score was merely used to confirm that initial determination. Thus, even though State Farm Mutual did not provide Plaintiff with insurance at all, the Ninth Circuit held that State Farm Mutual had somehow "made the decision that [Ms. Willes] would be charged at an increased rate" based on her credit history. Pet. App. 24.[4]

Neither the hypothetical "perfect credit" standard nor the use of rates offered by affiliated companies to determine

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[4] Notably, although State Farm Mutual generally offers auto insurance at a lower premium charge than State Farm Fire, Plaintiff offered no evidence as to what premium she would have been charged by State Farm Mutual, nor did she offer any evidence that State Farm Mutual or State Farm Fire would have offered her a better rate even if her credit history had been better than it was.

whether an increase has occurred are found anywhere in the language of the FCRA. The district court's common sense holding that an "increase in any charge" for insurance cannot occur "unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report" (Pet. App. 62, 72) accords with the language of the statute and provides a bright line rule. Applying the statutory language to the facts presented by this case, it is evident that the proper benchmark for determining if there was an increase in the charge for Ms. Willes' insurance is the price quoted to her based upon the information she herself supplied at her interview with a State Farm agent. Because there was no subsequent increase from that initial demand, there was no "adverse action" under the FCRA. Certiorari is warranted to review and correct the Ninth Circuit's erroneous interpretation of the statutory definition of "adverse action."

In addition, this Court should grant certiorari to resolve the conflict between the Courts of Appeals regarding the meaning of "willful" under section 1681n(a) of the FCRA. The Ninth Circuit erroneously held that willful noncompliance with the Act encompasses not only a knowing and intentional failure to comply, but also "reckless disregard." Pet. App. 53. Although the Ninth Circuit's position has been adopted by the Third Circuit, it has been rejected by the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, which properly require *conscious* disregard of the statutory requirements and/or knowledge that the conduct unlawfully impinges on the rights of consumers under the FCRA.

The Ninth Circuit incorrectly interpreted this Court's decisions as establishing a rule that the word "willful" when used in civil statutes means reckless, while in criminal statutes the meaning is limited to knowing, intentional conduct. Pet. App. 53-54. The existence of such a rule is contradicted by decisions such as *Kawaahau v. Geiger*, 523 U.S. 57, 61 (1998), in which this Court held that "willful" as used in section 523(a)(6) of the Bankruptcy Code did not include the meaning "reckless," noting that if Congress had

intended that meaning, it could have added the word "reckless" to the statute.

This Court has repeatedly stated that the meaning of the term "willful," whether in civil or criminal statutes, may vary depending on the particular statutory context in which it is used and that determination of its meaning should be based on a careful analysis of the statutory language. Such an analysis – which the Ninth Circuit failed to perform – demonstrates that the term "willful" as used in the FCRA was intended to encompass only knowing, intentional conduct committed with knowledge that the conduct impinged on the rights of consumers under the Act. In particular, in the hierarchy of violations and civil penalties created by the Act (willful noncompliance, knowing noncompliance, and negligent noncompliance), only willful noncompliance carries the possibility of punitive damages. As such, it was error for the Ninth Circuit to interpret "willful" as occupying an intermediate level of culpability – recklessness – between knowing and negligent. The Ninth Circuit's incorrect interpretation of "willful" improperly creates a massive expansion of liability for punitive and compensatory damages under the FCRA and directly conflicts with the decisions of other Courts of Appeals.

For these reasons and those set forth below, Petitioners respectfully submit that this Court should grant certiorari.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW AND CORRECT THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE STATUTORY DEFINITION OF "ADVERSE ACTION" UNDER THE FCRA

In its decisions below, the Ninth Circuit disregarded the ordinary and natural meanings of key terms in the FCRA's definition of "adverse action," thereby vastly expanding the potential notice obligations imposed upon insurance companies far beyond what the plain words of the statute authorize. This Court should grant certiorari to review and correct the Ninth Circuit's erroneous interpretation of this important federal statute.

A. Under the FCRA, a Consumer Who Has Done Nothing More Than Informally Request Quote Information Has Not "Applied For" Insurance

In reversing the District Court's decisions below, the Ninth Circuit rejected the District Court's ruling that Ms. Willes "'did not apply for and was not denied insurance coverage by Mutual within the meaning of FCRA,'" Pet. App. 75, despite the fact that Ms. Willes was quoted only State Farm Fire insurance and signed and submitted insurance applications specifically directed to State Farm Fire. Under the Ninth Circuit's decision, Ms. Willes' general request for information about insurance and "hope to obtain the best coverage available" (Pet. App. 75) somehow constituted an application for insurance with State Farm Mutual. The Ninth Circuit's ruling impermissibly distorts the meaning of the words "applied for" in the context of insurance.

The term "applied for" is not defined in the statute. "[S]ince it is neither defined nor a term of art, it should be construed 'in accordance with its ordinary or natural meaning'" *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1844 (2006) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)); *see also BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004) ("'[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning'") (quoting *Perrin v. United States*, 333 U.S. 37, 42 (1979)). In addition, the context in which a word is used further defines and limits its possible range of meanings. *See Dolan v. U.S. Postal Service*, 126 S. Ct. 1252, 1253-54 (2006) (statutory interpretation of word or phrase is limited by context); *Doe v. Chao*, 540 U.S. 614, 630 (2004) (words of a statute must be read in context).

The "ordinary or natural meaning" of the words "applied for" does not encompass an informal, oral request for information about insurance policies and prices. *See, e.g.*, *Black's Law Dictionary* (6th ed. 1990) (defining "apply" as "[t]o make a formal request or petition, usually in writing, to a court, officer, board, or company, for the granting of some favor, or of some rule or order, which is within his or their power or discretion. For example, to apply for an injunction,

for a pardon, *for a policy of insurance*, or for a receiver.") (emphasis added); *Cambridge Advanced Learner's Dictionary* (2006), available at http://dictionary.cambridge.org/define.asp?key=3588&dict=CALD ("to request something, usually officially, especially by writing or sending in a form"); *Merriam Webster's Collegiate Dictionary* 57 (10th ed. 1994) ("to make an appeal or request esp. in the form of a written application").

The words "applied for" ordinarily and naturally describe a formal submission by a person seeking acceptance or approval for something – for a new job, for a loan, for admission to a law school, or, as here, for insurance coverage. The words "applied for" do *not* ordinarily and naturally describe informal oral requests to a prospective employer for salary information, to a bank for potential interest rates and terms, or to a law school for tuition and curriculum information. Nor do those words ordinarily and naturally describe an informal request to an insurance company for quote information.[5] Significantly, Petitioners have found no instance in any other section of the United States Code where the words "apply for insurance" or "application for insurance" have the broad meaning attributed to them by the Ninth Circuit here. To the contrary, in each such instance it is clear that the words refer to a written application for

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[5] Petitioners submit that the plain meaning of "insurance . . . applied for" is insurance for which the consumer has submitted an application; resort to the legislative history of section 1681a(k)(1)(B)(i) is, therefore, unnecessary. The legislative history of this subparagraph does not in any event support the broad interpretation of "applied for" adopted by the Ninth Circuit. The only relevant passage in the legislative history states:

> Under Section 603(k), "adverse action". . . includes a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or any amount of, any insurance, in connection with the underwriting of insurance. This portion of the definition applies to adverse determinations with respect to existing insurance or *applications for new insurance.*

Economic Growth and Regulatory Paper Reduction Act of 1995, S. Rep. No. 104-185, at 32 (1995) (emphasis added). The use of the phrase "applications for new insurance" confirms that the statutory words "applied for" refer to formal applications for insurance.

insurance capable of being submitted, filed, processed, and reviewed.[6]

The Ninth Circuit attempted to justify its interpretation of the words "applied for" by asserting that an interpretation of "applied for" as limiting liability to the company that actually issued the insurance policy would eliminate all potential FCRA liability for denials of insurance. Pet. App. 48-49. To the contrary, there can be no question that a company which has denied a formal application for insurance based upon a consumer report has taken an adverse action, even though it has not "issued" a policy. The real question is whether the words "applied for" limit the definition of adverse action to situations where the insurance company has received and acted upon an application for insurance. The words "denial" of insurance "applied for" do not include a decision to quote insurance prices for a particular company among a group of companies and not other companies. Contrary to the interpretation of the Ninth Circuit (Pet. App 41, 48-49), the phrase "insurance existing or applied for" must be understood to limit the scope of the definition of adverse action, not to expand it.[7]

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[6] *See, e.g.*, 38 U.S.C. § 1922 (applications for disabled veterans insurance); 30 U.S.C. § 1522 (d), (e) (applications for insurance for investments in geothermal resources); 20 U.S.C. § 1079 (a), (b) (applications for education loan insurance). The submission of a written application for insurance is a virtually universal step in the formation of a consumer insurance contract. *See, e.g.*, 1A Lee R. Russ et al., *Couch on Insurance* §§ 11:1, 11:3 (3d ed. 2005) (a blank application is generally insurer's proposal or invitation to make an offer to contract; submission of the completed application by the consumer is an offer to contract, which the insurer may accept or decline after investigating the applicant).

[7] Significantly, the statute's definition of permissible uses of consumer information in insurance underwriting is not restricted to insurance that is existing or applied for. *Compare* 15 U.S.C. § 1681b(a)(3)(C) (permissible purposes of consumer reports include "use [of] the information in connection with the underwriting of insurance involving the consumer") *with* 15 U.S.C. § 1681a(k)(1)(B)(i) (adverse action includes a "denial or cancellation of, an increase in the charge for . . . any insurance, existing or applied for, in connection with the underwriting of insurance"). The contrast between the two provisions shows that the

The present case illustrates just how far the FCRA notice requirements have been expanded by the Ninth Circuit's interpretation of the words "applied for." The court's decision was premised upon the finding that Ms. Willes had "applied for" insurance with State Farm Mutual. But by Plaintiff's own admission, she contacted State Farm only "to obtain a quote for automobile insurance," "seeking the best policy" available. She had an initial oral conversation with a State Farm agent, but submitted to State Farm Mutual no form, no document, nor any other submission that would ordinarily or naturally be described as an "application." Indeed, Ms. Willes never even received a quote from State Farm Mutual.

Ms. Willes did "apply for" insurance with State Farm Fire. After Ms. Willes requested and received a quote from State Farm Fire, she made a decision to apply for the quoted insurance. She was then presented with printed documents entitled "Application for State Farm Fire and Casualty Insurance." Ms. Willes reviewed those applications and signed her name to three identical affirmations, stating that she applied for the insurance indicated and had read this application.

Thus, there is no doubt that Ms. Willes "applied for" insurance with State Farm Fire. The undisputed evidence of her formal applications specifically addressed to State Farm Fire should not be disregarded based on the Ninth Circuit's erroneous interpretation of an informal request for information about State Farm auto insurance in general as falling within the "ordinary or natural meaning" of the statutory words "insurance existing or applied for." Ms. Willes did not apply for a policy with State Farm Mutual.

A consumer's informal requests for insurance quotes with nothing more than the intent to gather information to make a later decision whether to apply for insurance should not subject each affiliated insurance company represented by the agent to FCRA notice obligations and the attendant legal liabilities. Significantly, although the Ninth Circuit opines

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addition of the phrase "insurance, existing or applied for" was meant to limit the definition of adverse action. Contrary to the Ninth Circuit, the phrase was not meant to remove any "temporal limitation." Pet. App. 41.

that its expansive interpretation furthers the objectives of FCRA, the language at issue was added to FCRA as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1995. That Bill, which amended a number of statutes, including FCRA, had a general objective of removing "unnecessary regulatory compliance requirements" in a manner consistent with consumer protection and other public policy goals. *See* S. Rep. No. 104-185, at 3, *supra* note 5.

Petitioners respectfully submit that this Court should grant certiorari to review and correct the Ninth Circuit's manifestly erroneous construction of the statutory language "insurance existing or applied for."

B. Under the FCRA, a Consumer Seeking an Initial Insurance Policy Who Is Not Offered the Very Best Rate Due to His or Her Credit Information Has Not Suffered a Rate "Increase"

The Ninth Circuit held that the phrase "an increase in any charge" in the definition of "adverse action" includes the situation where a new customer is billed an initial rate higher than that which she would have been billed – by the company at issue *or* any affiliated company – if her credit had been perfect. *See* Pet. App. 24, 43-44, 48-51. This broad interpretation severely distorts the meaning of the statutory language.

There is no dispute that, as the Ninth Circuit observed, "[i]ncrease means to make something greater." Pet. App. 40. The question is, greater compared to what? Applying the statutory language to the facts of the present case, it is clear that the Ninth Circuit's construction of the statute to hold that there is an increase whenever the charge is greater than the best possible rate available to consumers with the best possible credit rating is profoundly erroneous. Here, it is undisputed that Ms. Willes was quoted a premium based solely on information she herself provided as to her driving record. The subsequent check of her underwriting score did not result in an increase to the quoted premium. The Ninth Circuit's reasoning that the charge for her insurance was nevertheless increased because it was greater than a rate that

might hypothetically have been available from State Farm Mutual, an affiliated, but separate company, if her credit score had been perfect does violence to the ordinary and natural meaning of the words in the statute. As the district court correctly held, there was no "increase" in this case, because State Farm Fire, after making its "initial demand" for payment, did not subsequently increase the amount of that demand based on information in the insured's credit report. Pet. App. 62, 72.[8]

Of course, it would be possible that, in processing an application for insurance, a company could determine based on an applicant's credit history and other information that the premium charge should be higher than the initial quote. In such a circumstance, there may be an adverse action within the meaning of the statute. However, there is no support in the words of the statute for the Ninth Circuit's holding that the FCRA "requires [an adverse action] notice[] whenever a consumer pays a higher rate because his credit rating is less than the top potential score." Pet. App. 43. The Ninth Circuit's holding improperly expands the statute to cover factual circumstances such as in the present case where use of credit information incorporated into an underwriting score merely failed to *reduce* the premium quoted. The statute by its plain terms applies only to *increases* based on information in a consumer report.

The "perfect credit" benchmark invented by the Ninth Circuit is found nowhere in the language of the statute. Use of the benchmark would lead to the untenable result, certainly unintended by Congress, that virtually every

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[8] In *Reynolds* and *Edo*, the consumers in question (unlike Ms. Willes) were not actually provided with a quote based solely on the consumer's own answers about their driving history. However, in determining its statutory obligations, Geico used as a baseline the charge that would have applied if a premium rate had been determined and quoted to the plaintiff without reference to his credit information. Pet. App. 43. In *Reynolds*, the only credit information that the Hartford Companies were able to obtain with regard to the plaintiff in that case was that there was no credit information or insufficient credit information upon which to base a credit report. Pet. App. 45. Neither insurer raised the premium initially imposed. Pet App. 43-45.

purchaser of insurance would be required to receive a FCRA notice. *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (statutes should not be read to produce absurd and untenable results). The "ordinary or natural" reading of "an increase in any charge" implies a simple and logical benchmark, *i.e.*, the price that was actually quoted (or would have been quoted) to the consumer without reference to credit information.[9]

The Ninth Circuit used its erroneous interpretations of "applied for" and "increase in any charge" to extend the reach of the statute beyond the company to which a consumer actually "applies for" insurance to affiliated companies that did not offer insurance to the consumer. Contrary to the Ninth Circuit, the plain meaning of the statutory definition of adverse action is not elastic enough to include a determination by an affiliated company not to waive its threshold eligibility requirement that the consumer not have a speeding ticket within the past 36 months. Indeed, at the same time Congress added to the FCRA the definition of adverse action at issue, it made plain that insurance companies and credit companies may permissibly make offers to consumers prescreened on the basis of their credit information, without triggering notice obligations to consumers who do not receive the offer. *See* S. Rep. No.

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[9] Significantly, Congress knows how to draft statutory language describing an action based on an unfavorable rate, even though there has been no "increase in any charge." Thus, in 2003, Congress enacted 15 U.S.C. § 1681m(h), as part of the Fair and Accurate Credit Transactions Act, Pub. L. No. 108-159, Tit. III, § 311(a). Section 1681m(h)(1) requires notice when "any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit *on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person*, based in whole or in part on a consumer report." 15 U.S.C. § 1681m(h)(1) (emphasis added). Section 1681m(h)(1) also demonstrates that, contrary to the Ninth Circuit, Congress has not made a policy determination to require notice to every one who receives less than the most favorable terms, but only to those who receive terms less favorable than the most favorable terms available to a substantial proportion of consumers.

104-185, at 32-33, *supra* note 5 (discussing 15 U.S.C. § 1681b(c)(B)(i) & 1681a(l);"failure to include a consumer in a prescreening solicitation does not constitute adverse action"). The same amendments also made clear that a company may use consumer reports to review the accounts of existing customers, and that there is no adverse action if a consumer's account is not changed, even if the accounts of other consumers are changed in a favorable manner. *See id.* (discussing 15 U.S.C. 1681a(m)). Thus, the provisions that accompanied Congress's enactment of the definition of "adverse action" in the insurance context are incompatible with the Ninth Circuit's broad interpretation of that definition.

Ms. Willes' own situation demonstrates the extraordinary results created by the Ninth Circuit's interpretation. Ms. Willes was quoted a price for insurance from State Farm Fire. Once she decided to apply for that insurance and was approved, she was charged the quoted premium. Her complaint, however, is that she did not receive notice that she was not provided with a quote and an application form for insurance from a different company, State Farm Mutual. Contrary to the Ninth Circuit's decision, the fact that an affiliated company does not offer insurance to a consumer does not constitute a denial of insurance that has been applied for or an increase in the charge for insurance, by either the insuring company or the affiliate.

The Ninth Circuit's decisions in this case and the related FCRA cases before it raise important issues regarding the interpretation of a federal statute. The Ninth Circuit's erroneous rulings, if allowed to stand, will create vastly expanded, costly and burdensome notice obligations under the FCRA. Review by this Court is warranted.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT'S INTERPRETATION OF THE TERM "WILLFUL" IN SECTION 1681n OF THE FCRA AND THE INTERPRETATION OF THE SECOND, FOURTH, FIFTH, SEVENTH AND EIGHTH CIRCUITS

A. The Ninth Circuit's Interpretation of the Statutory Term "Willful" Directly Conflicts with Decisions of Other Circuits

This Court should grant certiorari to resolve the conflict between the Courts of Appeals as to the standard for willfulness under 15 U.S.C. § 1681n(a) of the FCRA. Section 1681n(a) provides for enhanced damages, including punitive damages and attorneys fees, for a "willful" failure to comply with the requirements of the FCRA. In *Reynolds*, the Ninth Circuit followed the Third Circuit in ruling that "willfulness" under the FCRA encompasses not only a knowing and intentional failure to comply, but also "reckless disregard." *See* Pet. App. 53-55 (following *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997)). As the Ninth Circuit acknowledged, its decision directly conflicts with the decisions of other Circuits, including the Sixth and the Eighth, that have held that "willful noncompliance" requires a knowing and intentional act that the defendant knows to be in violation of the requirements of the statute. *See* Pet. App. 54 n.17 (citing *Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002) ("[W]illful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law"), and *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (an actual belief of legality suffices to defeat willfulness liability under the FCRA)).

Likewise, contrary to the Ninth Circuit, the Second, Fourth, Fifth, and Seventh Circuits have adopted a narrower definition of willfulness, requiring a knowing and intentional failure to comply with the FCRA, with knowledge of illegality or *conscious* disregard for the rights of the consumer. *See Casella v. Equifax Credit Info. Servs.*, 56

F.3d 469, 476 (2d Cir. 1995) (affirming summary judgment in favor of defendant where defendant's "course of conduct d[id] not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA"); *Dalton v. Capital Assoc'd Indus. Inc.*, 257 F.3d 409, 418 (4th Cir. 2001) ("willfulness" under the FCRA requires that the defendant "'knowingly and intentionally committed an act in conscious disregard for the rights'" of the consumer) (citation omitted); *Stevenson v. TRW Inc.*, 987 F.2d 288, 293 (5th Cir. 1993) ("To be found in willful noncompliance, a defendant must have knowingly and intentionally committed an act in conscious disregard for the rights of others."); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) ("To act willfully, a defendant must knowingly and intentionally violate the Act, and it 'must also be conscious that [its] act impinges on the rights of others.'") (citation omitted).[10]

This conflict between the differing legal standards adopted by the Courts of Appeals warrants immediate resolution by this Court. The issue is of major importance not only to insurance companies, but also to other companies and businesses that are subject to the FCRA. Resolution of this issue now will crucially affect the course of further litigation in this case, in *Reynolds*, and in the other cases directly made subject to the Ninth Circuit's decision in *Reynolds*. Review now by this Court of the Ninth Circuit's decision will avoid protracted litigation in these putative class actions under an erroneous interpretation of the statutory standard. Moreover, guidance on this issue (and the other issues in this case) will affect other FCRA certified and putative class actions pending outside the Ninth Circuit. *See, e.g., In re Farmers*

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[10] Although the Ninth Circuit asserts that "conscious disregard" is not necessarily conscious, but may also be "reckless," *see* Pet. App. 53, the other Circuits that have required "conscious disregard" for willful noncompliance have used the word "conscious" in the dictionary meaning of "knowing." *See, e.g., Wantz*, 386 F.3d at 834 (for willful noncompliance, a defendant must be "'conscious that [its] act impinges on the rights of others'"); *Stevenson*, 987 F.2d at 293 (requiring "conscious disregard").

Ins. Co., FCRA Litig., No. CIV-03-158-F, MDL 1564, 2006 WL 1042450, at *14 (W.D. Okla. Apr. 13, 2006) (granting class certification in FCRA case; citing *Reynolds*); *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04CV-4-M, 2005 U.S. Dist. LEXIS 20361, at *9-12 (W.D. Ky. Sept. 15, 2005) (citing *Reynolds*). Accordingly, considerations of judicial economy and efficiency weigh heavily in favor of a grant of certiorari by this Court to resolve this conflict now rather than at a later stage of these litigations.

B. The Ninth Circuit Clearly Erred in Its Interpretation of the Statutory Term "Willful"

The Ninth Circuit's holding that a willful failure to comply encompasses conduct that is reckless is based upon the incorrect contention that this Court's prior decisions establish the rule that the word "willful" as used in civil statutes has a meaning that includes reckless, while in criminal statutes the meaning of the word "willful" is limited to knowing, intentional conduct. *See* Pet. App. 53-54. Contrary to the Ninth Circuit's opinion, this Court in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), construed the word "willful" in a civil statute to mean "deliberate or intentional." In *Kawaahau*, this Court rejected the contention that "willful" included the meaning "reckless" for purposes of section 523(a)(6) of the Bankruptcy Code, holding that the words "willful injury" indicate "a deliberate or intentional injury." 523 U.S. at 61. In *Kawaauhau*, the Court noted that if Congress had intended a broader meaning, it "might have selected an additional word or words, *i.e.*, 'reckless' . . . to modify 'injury.'" *Id.*

Furthermore, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), cited by the Ninth Circuit, does not support the criminal/civil distinction drawn by the Ninth Circuit in interpreting the word "willful." In *Thurston*, far from adopting such a distinction, this Court's analysis of the meaning of the word "willful" under the Age Discrimination in Employment Act looked to prior decisions construing both civil and criminal statutes. *See id.* at 126-27. This Court's analysis in *Thurston* also relied extensively on the legislative history of the ADEA, which strongly suggested that

Congress intended the ADEA to apply to reckless conduct. *See id.* at 127-29; *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (recognizing that the *Thurston* "reckless disregard" standard was grounded in the legislative history of the ADEA). In contrast, the legislative history of the FCRA lends no support to the Ninth Circuit's interpretation of willfulness under section 1681n(a).

More importantly, the Ninth Circuit's ruling is antithetical to the principles of statutory construction established by this Court and to the careful contextual analysis that this Court has given to the meaning of the words "willful" and "willfully." As this Court has repeatedly recognized, the word "willful" is "'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998); *see also Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (same). Thus, in construing "willful," this Court has examined both the immediate context in which the word is used and "the complex of provisions in which [it] is embedded." *Ratzlaf*, 510 U.S. at 141. In particular, in determining the meaning of the word "willful," this Court has looked to the word or words that "willful" modifies. *See, e.g., Kawaauhau*, 523 U.S. at 61 ("The word 'willful' in [11 U.S.C. § 523] (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury."). Moreover, in conformity with the rule of statutory interpretation that a "term appearing in several places in a statutory text is generally read the same way each time it appears," this Court has recognized that the word "willful" should not be construed so malleably as to have an individuated interpretation each place it appears or with regard to the different terms, phrases or statutory sections to which it refers. *Ratzlaf*, 510 U.S. at 143.

Analysis of the statutory language and context demonstrates that "reckless" is not within the possible range of meanings of the word "willful" as used in section 1681a and elsewhere in the FCRA. Subsection (a) of section 1681n contains two different damages provisions for willful noncompliance with the requirements of the FCRA. *See* 15

U.S.C. § 1681n(a)(1)(A) & (B). Both of these damage provisions are prefaced by the same statutory language ("Any person who willfully fails to comply . . . ."). *See* 15 U.S.C. § 1681n(a). The first damages provision is generally applicable to any willful failure to comply with the requirements of the FCRA, *see* 15 U.S.C. § 1681n(a)(1)(A), while the second provision applies specifically "in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose," *see* 15 U.S.C. § 1681n(a)(1)(B).

Under the principles of statutory interpretation discussed above, the word "willful" in section 1681n(a) must be given a meaning that is compatible with both of the phrases to which it refers. The use of the word "willful" to modify the act of "obtaining a consumer report under false pretenses or knowingly without a permissible purpose" is incompatible with the meaning of "reckless" attributed to it by the Ninth Circuit. By its plain terms, a failure to comply with the statute as described in subsection (a)(1)(B) must be knowing and intentional. The words "knowingly without a permissible purpose" indicate that knowledge is required of what is or is not a permissible purpose under the FCRA.[11] Likewise, the words "under false pretenses" strongly indicate that knowingly and intentionally deceptive conduct is required. *Cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (statutory language making unlawful the use or employment of "any manipulative or deceptive device or contrivance" strongly suggests that the statute "was intended to proscribe knowing or intentional conduct"). Accordingly, the concept of recklessness is inconsistent with the statutory language "obtaining a consumer report under false pretenses or knowingly without a permissible purpose," and the words "willful" and "willfully" when used to describe such conduct must mean knowing, deliberate and intentional.

This Court's established principles of statutory interpretation require that "willful" in section 1681n(a) be given the same meaning that it has in reference to subsection

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[11] Section 1681b of the FCRA sets forth the permissible purposes for consumer reports.

(a)(1)(B) when it is taken in reference to other acts of noncompliance with the requirements of the statute under subsection (a)(1)(A). As noted above, when the word "willful" "appear[s] in several places in a statutory text," it is "generally read the same way each time it appears." *Ratzlaf*, 510 U.S. at 143 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)).[12] Moreover, when, as here with the word "willful," a "*single* formulation" is "called into play" with regard to related provisions, there is "even stronger cause" to construe that formulation "the same way each time it is called into play." *See Ratzlaf*, 510 U.S. at 143. Accordingly, the meaning of "willful," as elucidated and limited by its use to describe a knowing violation of the statutory restrictions on obtaining consumer reports, applies also to its use to describe noncompliance in general with the statutory requirements. The word cannot mean "knowing and intentional" with regard to subsection (a)(1)(B) and "reckless" with regard to subsection (a)(1)(A).

In addition, section 1681n read as a whole confirms that "willful" as used in subsection (a) does not mean "reckless." Subsection 1681n(b) is headed "Civil liability for knowing noncompliance." Subsection (b) addresses precisely the same conduct addressed by subsection (a)(1)(B), namely, "obtain[ing] a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose," § 1681n(b), but provides for liability to a consumer reporting agency, not to consumers. Unlike subsection (a), subsection (b) does not require a "willful" violation and does not provide for punitive damages or attorney's fees. Subsection (b) and its heading confirm that obtaining a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose is by its plain terms "knowing noncompliance" with the FCRA. "Knowing noncompliance" by definition is not merely reckless. Accordingly, it is evident from the statutory scheme that under subsection (a),

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[12] *See also Clark v. Martinez*, 543 U.S. 371, 380 (2005) (statutory language given a limited construction in one context must be interpreted consistently in other contexts, even though other of the statute's applications, standing alone, would not support the same limitation).

"willfully" obtaining a consumer report under false pretenses or knowingly without a permissible purpose must require a greater level of culpability than "knowingly" committing the same violation under subsection (b).[13] Thus, section 1681n read as a whole is inconsistent with the Ninth Circuit's conclusion that subsection (a) should be interpreted to impose liability for the lesser degree of culpability represented by "reckless" noncompliance.

The FCRA's other penalty provisions, section 1681q and section 1681o, bolster the conclusion that "willful" does not mean "reckless" for purposes of section 1681n. Section 1681q provides criminal penalties for "knowingly and willfully obtain[ing] information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q. As in section 1681n, in this context too, the word "willfully" creates a standard that requires more than mere "knowing," not less. It clearly does not create liability for a reckless violation of the statute. Under the rule of statutory construction that a "term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf*, 510 U.S. at 143, the word "willfully" should be given the same meaning in section 1681n that it has in section 1681q. Thus, section 1681q further confirms that, contrary to the Ninth Circuit's holding, "willful noncompliance" in section 1681n(a) does not refer to an intermediate level of culpability between negligence and knowing, but creates a higher standard for liability that requires an intentional and deliberate failure to comply with the requirements of the FCRA.[14]

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[13] An analogous example of Congress' understanding of the terms willfully and knowingly is provided by its amendment of the Endangered Species Act. *See* Endangered Species Act Amendments of 1978, H.R. Conf. Rep. No. 95-1804, *reprinted in* 1978 U.S.C.C.A.N. 9484, 9493 (amending penalty provisions of Endangered Species Act to "*reduce*[]" the standard from "willfully" to "knowingly" to facilitate enforcement and to make clear that knowledge of the law is not an element of a violation) (emphasis added).

[14] This construction of the word willful also accords with standard dictionary definitions. *See, e.g., Merriam Webster's Collegiate*

Section 1681o provides for civil liability for negligent noncompliance with the requirements of the FCRA. Unlike the civil liability created under section 1681n(a) and (b) for willful noncompliance and knowing noncompliance, section 1681o permits the recovery of "actual damages" only and does not impose an alternate minimum damages amount. *See* 15 U.S.C. § 1681o(a)(1). A comparison of the respective damages provisions of section 1681o (negligent noncompliance) and section 1681n(a) (willful noncompliance) and section 1681n(b) (knowing noncompliance) confirms that "willful noncompliance," which alone carries the possibility of punitive damages, represents the highest level of culpability under the statute, with the most severe sanctions. The Ninth Circuit's interpretation of the word "willful" to encompass "recklessness" erroneously makes "willful noncompliance" an intermediate level of culpability, inconsistent with the clear statutory hierarchy of violations.

C. The Ninth Circuit's Interpretation of "Willfulness" Relies Upon a Mistaken View of the Policies and Purposes of the FCRA

Rather than examine the statutory language in context, the Ninth Circuit relied upon its own belief as to what would be a "fair and balanced" and "practical" interpretation of the word "willful." Pet. App. 54. In concluding that a "reckless" standard would "best further the purposes and objectives of the Act," the Ninth Circuit improperly emphasized what it viewed as the need to ensure that section 1681n "d[id] not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression'" and to distinguish between such companies and companies who might "come to a tenable, albeit erroneous, interpretation of the statute." Pet. App. 54-55; *see also id.* at 55 ("reliance on creative lawyering that provides

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Dictionary 1354 (10th ed. 1994) (defining willful as "obstinately and often perversely self-willed" or "done deliberately: INTENTIONAL").

indefensible answers will [not] ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement"). Based upon such considerations, the Ninth Circuit in *Reynolds* reversed the grant of summary judgment in favor of the defendants on the issue of willfulness, ruling that "at least some" of the defendant insurance companies' interpretations of the FCRA were "implausible" or "frivolous." Pet. App. 48, 55.[15]

The Ninth Circuit's precepts as to the application of its willfulness/recklessness standard and its concerns that companies and attorneys will abuse situations in which they are faced with a question of "first impression" have no basis in the statutory language or in the legislative history. Moreover, if followed, the Ninth Circuit's articulation of its reckless standard will result in a massive and improper expansion of liability under the statute. Under the Ninth Circuit's decision, factors that normally favor a finding of an absence of willfulness and/or recklessness as a matter of law are turned on their heads, all in service of a jaundiced and unsupported view of how businesses and companies formulate their conduct in regulatory and compliance contexts and how lawyers view their obligations to their clients and to the legal system.

For example, the fact that an issue is one of first impression normally weighs toward excusing or mitigating a failure to understand a legal issue or comply with regulatory requirement. Thus, in *Stevenson*, 987 F.2d at 296, the Fifth Circuit reversed a finding of willful noncompliance and an award of punitive damages under the FCRA because "[t]here was no prior guidance to suggest" that the defendant's conduct did not comply with the Act.[16] Likewise, the fact

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[15] Although neither the trial court nor the Ninth Circuit ruled upon willfulness issues in connection with the claims against State Farm, the Ninth Circuit's decision in *Willes* made all aspects of its decision in *Reynolds* applicable to this case. *See* Pet. App. 24. Accordingly, the legal issues raised by the Ninth Circuit's application of its "willfulness" standard may properly be raised in this Petition.

[16] Similarly, in the context of Federal Rule of Civil Procedure 11, courts have repeatedly refused to find a legal argument frivolous or

that a defendant has consulted counsel or that the trial court agreed with the defendants' interpretation of their legal obligations would generally negate willfulness even under a recklessness standard. *See, e.g., Thurston*, 469 U.S. at 129 (defendant did not act in reckless disregard of ADEA's legal requirements where its "officials met with their lawyers to determine whether the mandatory retirement policy violated the Act"); *Reynolds v. Hartford Fin. Servs. Group*, 426 F.3d 1020, 1041 (9th Cir. 2005) (Bybee, J., dissenting in part) (disagreeing with the panel's ruling as a matter of law that defendants willfully failed to comply; noting that "district court *agreed* with [defendants'] legal position, a position the majority now declares to be 'nonsensical' and 'untenable'"), *amended*, 435 F.3d 1081 (9th Cir. 2006).[17] The Ninth Circuit improperly and incorrectly operates under the opposite presumption.[18]

In sum, the Ninth Circuit's decision presents a direct and substantial conflict between the Circuits regarding the statutory interpretation of the word "willful" in section 1681n of FCRA. This Court should grant certiorari to resolve that conflict and to correct the Ninth Circuit's erroneous interpretation and application of section 1681n.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

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unreasonable where it concerns a matter of first impression. *See* Georgene M. Vairo, *Rule 11 Sanctions* 340-46 (3d ed. 2004).

[17] *See also* Vairo, *supra* note 16, at 351 (the fact that judges who have ruled on the merits of a pleading disagree provides significant evidence that the pleading was not frivolous or unreasonable).

[18] Furthermore, contrary to the Ninth Circuit's implication that the meaning of the statutory definition of adverse action is "objectively apparent" (Pet. App. 54), the Federal Trade Commission, the agency charged with enforcing the FCRA, contended in its amicus brief filed in the Ninth Circuit in this case that the "statutory provision [defining adverse action] is ambiguous" and must be construed by resort to the legislative history. *See* Brief of the FTC as *Amicus Curiae* Supporting Appellant and Urging Reversal, at 16, *Willes v. State Farm Fire & Cas. Co.*, No. 03-35848 (9th Cir. Feb. 19, 2004).

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APPENDIX

RELEVANT STATUTES

15 U.S.C. § 1681a.

Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) **Consumer report.** —

(1) **In general.** — The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for —

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) **Exclusions.** — The term "consumer report" does not include —

(A) any —

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) any communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (o) of this section.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) The term "medical information" means information or records obtained, with the consent of the individual to

whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

(j) Definitions relating to child support obligations

(1) Overdue support

The term "overdue support" has the meaning given to such term in section 666(e) of Title 42.

(2) State or local child support enforcement agency

The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) Adverse action. —

(1) Actions included. — The term "adverse action" —

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means —

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that

adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681 b(a)(3)(D) of this title; and

(iv) an action taken or determination that is—

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) Applicable findings, decisions, commentary, and orders. — For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

(l) Firm offer of credit or insurance. — The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness or insurability, as applicable, that are established—

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification —

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was —

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) Credit or insurance transaction that is not initiated by the consumer. — The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of —

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) State — The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(o) Excluded communications — A communication is described in this subsection if it is a communication —

(1) that, but for subsection (d)(2)(E) of this section, would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of —

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); or

(5) with respect to which —

(A) the consumer who is the subject of the communication —

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication —

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time

of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which an action is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) Consumer reporting agency that compiles and maintains flies on consumers on a nationwide basis. — The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nation:

(1) Public record information.

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

15 U.S.C. § 1681b.

Permissible purposes of consumer reports

(a) In general. — Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

> **(1)** In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.
>
> **(2)** In accordance with the written instructions of the consumer to whom it relates.
>
> **(3)** To a person which it has reason to believe —
>
> > **(A)** intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
> >
> > **(B)** intends to use the information for employment purposes; or
> >
> > **(C)** intends to use the information in connection with the underwriting of insurance involving the consumer; or
> >
> > **(D)** intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information —

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that —

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the

last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of Title 42 for use to set an initial or modified child support award.

(b) Conditions for furnishing and using consumer reports for employment purposes. —

(1) Certification from user. — A consumer reporting agency may furnish a consumer report for employment purposes only if —

(A) the person who obtains such report from the agency certifies to the agency that —

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report a summary of the consumer's rights

under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(2) Disclosure to consumer. — A person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless —

(A) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(B) the consumer has authorized in writing the procurement of the report by that person.

(3) Conditions on use for adverse actions. — In using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates —

(A) a copy of the report; and

(B) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer. —

(1) **In general.** — A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) of this section in connection with any credit or insurance transaction that is not initiated by the consumer only if —

(A) the consumer authorizes the agency to provide such report to such person; or

(B) (i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e) of this section; and

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e) of this section, to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph.

(2) Limits on information received under paragraph (1)(B). —

A person may receive pursuant to paragraph (l)(B) only —

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or

experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries. — Except as provided in section 1681g(a)(5) of this title, a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) Reserved

(e) Election of consumer to be excluded from lists.—

(1) In general. — A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(I)(B) of this section in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) Manner of notification. A consumer shall notify a consumer reporting agency under paragraph (1) —

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system. — Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall —

(A) inform the consumer that the election is effective only for the 2-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) Effectiveness of election. — An election of a consumer under paragraph (1) —

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency —

(i) subject to subparagraph (C), during the 2-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the

agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

(5) Notification system. —

(A) In general. — Each consumer reporting agency that, under subsection (c)(1)(B) of this section, furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall —

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after September 30, 1996, and not less than

annually thereafter, in a publication of general circulation in the area served by the agency —

(I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to notify the agency of the consumer's election under clause (i).

(B) Establishment and maintenance as compliance. — Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.

(6) Notification system by agencies that operate nationwide. — Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) Certain use or obtaining of Information prohibited. — A person shall not use or obtain a consumer report for any purpose unless —

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and

(2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

(g) Furnishing reports containing medical information. — A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction or a direct marketing transaction, a consumer report that contains medical information about a consumer, unless the consumer consents to the furnishing of the report.

15 U.S.C. § 1681n.

Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of

> **(1)(A)** any actual damages sustained by the consumer as a result of the failure or damages of not less thou $100 and not more than $1,000; or
>
> > **(B)** in the case of liability of a natural person for obtaining a consumer report under false pretences or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1.000, whichever is greater;
>
> **(2)** such amount of punitive damages as the court may allow; and
>
> **(3)** in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 U.S.C. § 1681o.

Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of-

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court;

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable to the pleading, motion, or other paper.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AUGUST 4, 2005

This case was not selected for publication in the Federal Reporter. Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

United States Court of Appeals, Ninth Circuit.
Julie WILLES, Plaintiff-Appellant,
v.
STATE FARM FIRE AND CASUALTY COMPANY; et al., Defendants-Appellees.
No. 03-35848.
D.C. No. CV-01-01457-AJB.

Argued & Submitted March 8, 2005.
Decided Aug. 4, 2005.

N. Roberta Stoll, Esq., Steve D. Larson, Esq., Scott A. Shorr, Esq., Stoll Stoll Berne Lokting & Schlachter, PC, Portland, OR, for Plaintiff-Appellant.

Stuart D. Jones, Esq., Portland, OR, for Defendants-Appellees.

Appeal from the United States District Court for the District of Oregon, Anna J. Brown, District Judge, Presiding.

Before REINHARDT, BERZON, and BYBEE, Circuit Judges.

MEMORANDUM

Plaintiff appeals from the district court's grant of summary judgment to all defendants. First, with regard to State Farm

Fire and Casualty Company, the district court granted summary judgment on the ground that in cases involving an initial policy of insurance, an "increased [sic] in any charge" cannot occur "unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report." In light of *Edo v. GEICO Casualty Co.*, No. 04-35279, we reject this holding and reverse. Second, the district court reasoned that although State Farm Mutual Automobile Insurance Company denied Willes a policy based on his credit information and made the decision that he would be charged at an increased rate, Mutual was not liable because Willes "did not apply for and was not denied insurance coverage by Mutual within the meaning of FCRA." Again, we reverse, in light of *Edo*. We remand these and all remaining issues to the district court for consideration in light of *Edo*.

REVERSED AND REMANDED.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JANUARY 25, 2006

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JASON RAY REYNOLDS; MATTHEW RAUSCH, *Plaintiffs-Appellants*, v. HARTFORD FINANCIAL SERVICES GROUP, INC.; HARTFORD FIRE INSURANCE COMPANY, *Defendants-Appellees*.	No. 03-35695 D.C. No. CV-01-01529-AJB
AJENE EDO, *Plaintiff-Appellant*, v. GEICO CASUALTY COMPANY, *Defendant*, and GEICO GENERAL INSURANCE COMPANY; GEICO INDEMNITY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY, Subsidiaries of Geico corporation, *Defendants-Appellees*.	No. 04-35279 D.C. No. CV-02-00678-AJB ORDER AND OPINION

Appeal from the United States District Court

for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted
March 8, 2005—Portland, Oregon

Filed January 25, 2006

Before: Stephen Reinhardt, Marsha S. Berzon, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Reinhardt

COUNSEL

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Robert D. Allen and Meloney Cargil Perry, Baker & McKenzie, Dallas, Texas; Christopher Van Gundy, Baker & McKenzie, San Francisco, California; Thomas Gordon, Gordon & Polscer, LLC, Portland, Oregon, for appellees GEICO Casualty Company, GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company.

Lisa E. Lear, Douglas G. Houser, Loren D. Podwill, and Andrew Grade, Bullivant Houser Bailey PC, Portland, Oregon, for appellees Hartford Financial Services Group, Inc., and Hartford Fire Insurance Company.

William E. Kovacic, General Counsel, John F. Daly, Deputy General Counsel for Litigation, and Lawrence DeMille-Wagman, on behalf of the Federal Trade Commission as *amicus curiae* in support of appellants Edo, Rausch, and Reynolds.

Gilbert T. Schwartz and Heidi S. Wicker, Schwartz & Ballen LLP, on behalf of The American Insurance Association, The Property Casualty Insurers Association of America, The National Association of Professional Insurance Agents, and The National Association of Mutual Insurance Companies, as *amicus curiae* in support of appellees, Hartford Financial Services Group, Inc., and Hartford Fire Insurance Company.

ORDER

The opinion and dissent filed on October 3, 2005, amended on October 24, 2005, slip op. 14451, and appearing at 426 F.3d 1020 (9th Cir. 2005), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit. The clerk shall file the attached opinion in its place.

OPINION

REINHARDT, Circuit Judge:

Under the Fair Credit Reporting Act ("FCRA"), insurance companies are required to send adverse action notices to consumers whenever they increase the rates for insurance on the basis of information contained in consumer credit reports. 15 U.S.C. §§ 1681a(k)(1)(B)(i), 1681m(a).[1]

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[1] Section 168 1m(a) provides that any person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must provide "notice of the adverse action to the consumer." Section 1681a(k)(1)(B)(i) defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

The principal question before us is straightforward: Does FCRA's adverse action notice requirement apply to the rate first charged in an initial policy of insurance? We hold that the answer is yes: The Act requires that an insurance company send the consumer an adverse action notice whenever a higher rate is charged because of credit information it obtains, regardless of whether the rate is contained in an initial policy or an extension or renewal of a policy and regardless of whether the company has previously charged the consumer a lower rate.

We also resolve five ancillary questions. First, we hold that FCRA's adverse action notice requirement applies whenever a consumer would have received a lower rate for insurance had his credit information been more favorable, regardless of whether his credit rating is above or below average. Specifically, the requirement covers those whose credit information is disregarded and replaced for purposes of a rate computation by an average or neutral credit figure, so long as the insurance rates would have been lower had the credit information been more favorable. Second, we hold that charging more for insurance on the basis of a transmission stating that no credit information or insufficient credit information is available constitutes an adverse action based on information in a consumer report and therefore requires the giving of notice under FCRA. Third, we hold that, to comply with FCRA's notice requirement, a company must, *inter alia*, communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. Fourth, we hold that when a consumer applies for insurance with a family of companies and is charged a higher rate for insurance because of his credit report, two or more companies within that family may be jointly and severally liable. The notice requirement applies to any company that makes a decision that a higher rate shall be imposed, issues a policy at a higher rate, or refuses to provide a policy at a

lower rate, if the company's action is based in whole or in part on the consumer's credit information.[2] Finally, we adopt the Third Circuit's definition of "willfully," as that term is employed in FCRA, and hold that a company is liable for a willful violation of FCRA if it "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997) (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996) (as amended)). Like the Third Circuit, we hold that conscious disregard means "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." *Id.* at 227.

I. THE ACT AND THE APPEALS

The Fair Credit Reporting Act seeks to ensure the "[a]ccuracy and fairness of credit reporting" through a variety of means. 15 U.S.C. § 1681. Central to this goal, FCRA limits the persons who may obtain consumer credit reports and requires users of such reports to notify consumers when, in reliance on a consumer report, "adverse action" has been taken. 15 U.S.C. §§ 1681a, 1681b, 1681m. Specifically, § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer." Adverse action notices advise consumers that an adverse action has been taken against them, and the nature of that action, and alerts them that they may view a copy of the consumer report that triggered the adverse action free of charge and correct any errors affecting their economic well-being. Even if reports are free from error, adverse action notices give consumers important information about how

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[2] We do not intend this list to be exhaustive.

improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future.

To resolve the various issues that have arisen regarding FCRA's notice of adverse action requirement in a set of related cases, we have consolidated two appeals for purposes of this opinion: *Reynolds v. Hartford Financial Services Group, Inc.*, No. 03-35695 and *Edo v. GEICO Casualty Co.*, No. 04-35279. *Reynolds* presents the principal issue: May a rate first charged in an initial policy of insurance constitute an increased rate for purposes of the FCRA adverse action notice requirement? Hartford Fire asserts that a rate cannot qualify as increased unless a lower rate has previously been charged to the customer. *Reynolds* also presents the issues whether a communication stating that no credit information or insufficient credit information is available constitutes a "consumer report" under the statute and whether an adverse action notice that does not tell the consumer that an adverse action has been taken against him, describe that action and its effect upon the consumer, and identify the parties taking the action is sufficient under FCRA. *Edo* presents the issue whether an adverse action occurs whenever a consumer would have received a lower rate if his credit information had been more favorable; or whether an insurance company's practice of providing an adverse action notice only if the consumer's credit information is below average (or "neutral") and that factor results in the imposition of a higher rate than if his credit rating had been average, is consistent with FCRA. Both *Edo* and *Reynolds* also require us to decide which companies are liable under FCRA for the failure to give notice of an increased rate when several affiliated companies are involved in the process of rate-setting and policy issuance. Finally, defendants in both cases seek summary judgment on the alternative ground that their actions were not willful as a matter of law. To address this last contention, we must define the meaning of the term "willfully" as it applies in FCRA.

A. Reynolds v. Hartford Financial Services Group, Inc.

Jason Reynolds is the sole remaining named-plaintiff in this class action against Hartford Fire Insurance Company ("Hartford Fire").[3] He seeks statutory and punitive damages, as well as reasonable attorneys fees for the company's violation of FCRA's adverse action notice requirement. Reynolds' claims relate to two insurance policies he obtained, one for automobile and the other for homeowners insurance. On the record before us, Hartford Fire set the rates to be charged for both policies. Hartford Property and Casualty Insurance Company of Hartford ("PCIC Hartford") issued Reynolds the homeowners insurance policy and Hartford Insurance Company of the Midwest ("Hartford Midwest") issued him the automobile insurance policy. We refer to Hartford Fire, Hartford PCIC, and Hartford Midwest as the "Hartford Companies."

Reynolds originally sued Hartford Fire and later sought to amend his complaint to add PCIC Hartford and Hartford Midwest.[4] Hartford Fire sought summary judgment, which the district court granted on two grounds. First, it held that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Second, and in the alternative, it held that an insurance company that issues a policy to a new policyholder "cannot [be held to] 'increase' a charge for insurance unless the insurer makes an initial demand for payment of the insured and subsequently increases the amount of that demand based on information in the insured's credit report."

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[3] Rausch is no longer pursuing his appeal.

[4] Reynolds also named Hartford Financial Services Group, Inc., which serves as a holding company, but is not pursuing his claims against that entity.

The second and alternative holding relies on a previous decision by the same court, *Mark v. Valley Insurance Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003). On the basis of that earlier decision, the district court also denied Reynolds leave to amend, reasoning that he could not "state viable FCRA claims against the proposed defendants," PCIC Hartford and Hartford Midwest. In other words, leave was denied on the ground that the policies were initial issues and no previous charge had been made to the customer at a lower rate.

The Hartford Companies' Use of Credit Information

During the relevant time period, Hartford Fire and the American Association of Retired Persons ("AARP") had an agreement under which Hartford Fire or one of its subsidiaries would issue automobile and homeowners insurance to AARP members at a premium rate if those individuals enjoyed favorable credit ratings. While the procedures used for issuing the two kinds of insurance varied slightly, they were the same in most relevant respects. In both cases, employees of Hartford Fire would make all of the decisions concerning AARP members' insurance policies for all of its subsidiaries, including Hartford Midwest, which issued automobile insurance, and PCIC Hartford, which issued homeowners insurance. In doing so, Hartford Fire's employees would obtain credit information from Trans Union, a consumer information bureau, through a contract to which Hartford Fire and Trans Union were signatories. This information would be conveyed to Hartford Fire through the risk assessment and data supply firm, ChoicePoint, in the form of an "insurance score." High insurance scores correlated with more favorable credit reports. With regard to automobile insurance, if an AARP member had a high enough insurance score, he would qualify for a ten percent discount. With regard to homeowners insurance, only if the member obtained a top insurance score could he be assigned to the top tier of insurance with the best rate.

If, when Hartford Fire sent a request for an insurance score, no credit information matched the name and address of the consumer or if the information that did match was insufficient to generate an insurance score, this information would be transmitted to the company, and the consumer would be labeled a "no hit" or a "no score" and would not be assigned an insurance score. Without an insurance score, the consumer could not qualify for the ten percent discount with Hartford Midwest, nor could he be placed in the top insurance tier with PCIC Hartford. As a result, a "no hit" or "no score" consumer would in numerous instances pay more for insurance than if he had received a high insurance score.[5]

The Hartford Companies' Adverse Action Policy

Hartford Fire is the only one of the Hartford Companies to have developed or sent adverse action notices. The parties dispute whether Hartford Fire actually sent an adverse action notice to Reynolds, but that is a question of fact for the fact-finder. Whether the notice Hartford Fire contends it sent was adequate under FCRA is a question of law that we discuss below.

Reynolds' Insurance Policies

Reynolds applied for both automobile and homeowners insurance by contacting the Hartford Companies. He had no existing policy with that group. An employee of Hartford Fire collected personal information and attempted to obtain

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[5] In connection with Reynolds' request for automobile insurance, he was labeled a "no hit" because his name and address did not match any person's in the national database. In connection with his homeowners insurance request, he was labeled a "no score" because, while his name and address did call up information in the database, the information was insufficient to generate an insurance score. As both a label of "no hit" and "no score" have the same practical effect, for convenience's sake we will hereafter refer in this opinion to a report in either category as a "no hit."

Reynold's insurance score twice, once for each insurance application. The credit bureau reported both times that Reynolds was a "no hit." *See* n.5, *supra*. Although Hartford Midwest issued him an automobile insurance policy and Hartford PCIC issued him a homeowners insurance policy, as a result of his "no hit" status Reynolds did not receive either of the AARP premium rates.

B. Edo v. GEICO Casualty Co.

The second of the consolidated cases relates to an automobile insurance policy obtained by Ajene Edo. Like Reynolds, Edo seeks statutory and punitive damages, as well as reasonable attorney fees, on behalf of a class of consumers for violation of FCRA's adverse action notice requirement. He, too, is the sole remaining named-plaintiff. Edo appeals the district court's grant of summary judgment to defendants Government Employees Insurance Company ("Government Employees"), GEICO General Insurance Company ("GEICO General"), and GEICO Indemnity Corporation ("GEICO Indemnity").[6] These are affiliated companies, all of which are subsidiaries of the GEICO Corporation and are referred to collectively by the parties as the "GEICO Companies." We sometimes refer to that group of companies by that designation and sometimes simply as GEICO.

Unlike Hartford Fire, the GEICO Companies concede that adverse actions can occur with respect to the first rates charged in an initial policy of insurance. They do not assert that in order for an adverse action to occur there must be an increase to a rate that the consumer has previously been charged. Nevertheless, the district court granted summary

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[6] Edo is not pursuing his appeal against GEICO Casualty Corporation ("GEICO Casualty"), a company that writes insurance policies for high risk consumers and charges the highest rates. GEICO Casualty did not issue a policy of insurance to Edo, and Edo did not seek to obtain a policy at the unfavorable rates the company charged.

judgment with respect to the various GEICO entities on a number of different grounds. First, the court held that Edo did not have standing to bring a FCRA claim against Government Employees because he "was not eligible for insurance coverage from [that company] regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel." Next, it granted summary judgment in favor of GEICO General because that company "did not contract with Plaintiff to issue or to underwrite an insurance policy." This ruling was in accord with the district court's previous holdings in other related cases that only the company that issues the insurance policy can be held to have taken an adverse action under FCRA. *See Ashby v. Farmers Group, Inc.*, 261 F. Supp. 2d 1213, 1222 (D. Or. 2003); *Razilov v. Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977, 989-90 (D. Or. 2003). Finally, it granted summary judgment to GEICO Indemnity because "the premium charged to [Edo] by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."

GEICO's Use of Credit Information

The GEICO Companies are organized by risk. GEICO General provides preferred policies with low rates for those who are lesser insurance risks. Government Employees also provides preferred policies, but only to government employees. GEICO Indemnity issues standard policies with mid-level rates for moderate risk consumers. Finally, GEICO Casualty issues non-standard policies with high rates for those who are greater risks. The GEICO Companies began using consumer credit reports in early 1999.

In order to purchase insurance, consumers call a toll-free number and talk to a GEICO sales counselor. The sales counselor is employed by Government Employees but works on behalf of all of the GEICO Companies. Indeed, all of the

work of the GEICO Companies is performed by Government Employees workers, as the other companies do not have any employees. Upon learning that a customer wishes to purchase automobile insurance, the sales counselor elicits basic information and asks whether he may use the customer's credit information when arranging for his policy. If the customer acquiesces, the sales counselor obtains the credit information in the form of an insurance score calculated by the data analysis firm Fair Isaacs from information supplied by Trans Union. Government Employees is the only GEICO company that has a contract with Trans Union and Fair Isaacs to provide this information. Using a Government Employees computer system, the sales counselor converts the insurance score to a credit weight and combines it with other weights assigned to other insurance factors, such as age and number of accidents to arrive at a final total insurance weight. Based on that final weight, the sales counselor assigns the customer to one of the GEICO Companies and determines the appropriate insurance tier. This determination serves to establish the rate the consumer will be charged. After the information the customer has provided has been verified, he is issued an insurance policy at that rate.

GEICO's Adverse Action Policy

The GEICO Companies' original FCRA policy, adopted in 1999, was to send adverse action notices to all consumers whose credit reports were used in making insurance decisions. Later that same year, GEICO changed its policy, at least in part to reduce costs. Instead of sending adverse action notices to everyone, GEICO developed a system for determining which actions it deemed adverse by comparing the rate charged to the rate that it would have charged had the credit information been "neutral."

GEICO's new system, however, did not comply with FCRA's requirements. The GEICO Companies' policy during the period relevant to this case was to compare the

consumer's actual company and tier placement (which, as described above, was based in part on his credit rating) with the company and tier to which he would have been assigned had a "neutral" credit weight been substituted for his actual credit weight when calculating the final total insurance weight. The GEICO Companies' "neutral" credit weight was defined, generally speaking, as the weight that reflected the average credit rating of all consumers. The GEICO Companies would calculate two final total insurance weights, using only one variable —the actual credit weight in one case, and the "neutral" credit weight in the other. Only if the final total insurance weight using the "neutral" credit weight would have resulted in the consumer's placement with a different company or in a different tier than that to which the consumer was actually assigned, and only if such different placement would have resulted in the consumer's being charged a lower rate, would GEICO Companies issue an adverse action notice. In other words, the GEICO Companies' policy was to refrain from sending a statutory notice if use of the consumer's actual credit information caused the applicant to be placed with an entity and in a tier that resulted in the charging of the same or a lower rate than the rate that he would have been charged had the calculation and the ensuing assignment been based on a "neutral" or average credit rating. Under this policy, even if the rate ultimately charged was higher than the rate to which the consumer would have been entitled had he had a more favorable credit rating, the statutory notice was not sent if use of the "neutral" and the actual credit data would have led to an assignment to the same entity and tier. Thus, it was *not* GEICO's policy to send adverse action notices to all consumers who would have been charged lower rates had they enjoyed a more favorable credit rating.

Edo's Insurance Application

Following Edo's call to GEICO's toll-free number, the sales counselor used the credit information he obtained to

place its new customer with GEICO Indemnity. The GEICO Companies then applied its policy for determining whether an adverse action had occurred. GEICO calculated that, had the neutral credit weight been used instead of Edo's actual credit weight, the resulting final total weight would still have resulted in Edo's being placed with GEICO Indemnity. That Edo's placement, and the rate charged for his insurance, did not improve when the "neutral" weight was used is not surprising, as Edo's actual credit weight was better than average. Under its policy, however, the GEICO Companies did not issue him an adverse action notice.

It is uncontested that if the GEICO Companies had used the highest credit weight that a consumer could receive rather than the neutral credit rate to determine Edo's alternate placement, GEICO would have placed Edo with GEICO General, a preferred company, and offered him a lower insurance rate. In short, if Edo's credit information had been more favorable (even though it was already above average), he would have been charged less for his insurance. In 2002, the GEICO Companies changed its policy and began to issue adverse action notices whenever a report with more favorable credit information would have resulted in a lower insurance rate. Under the new policy, Edo would have received the statutory notice.

II. ANALYSIS

A. Initial Policies of Insurance

[1] The principal question in this and a number of related cases[7] constitutes a matter of first impression: Does FCRA's adverse action notice requirement apply to the rates first charged in an initial policy of insurance or is it limited to an

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[7] The related cases are resolved by memoranda of disposition filed concurrently herewith.

increase in a rate that the consumer has previously been charged? As with all statutory interpretation, we begin with the text of the statute. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). An adverse action with respect to insurance is defined by 15 U.S.C. § 1681a(k)(1)(B)(i) as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

Specifically, we must decide whether charging a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report constitutes an "increase in any charge" within the meaning of FCRA. First, we examine the definitions of "increase" and "charge." Hartford Fire contends that, limited to their ordinary definitions, these words apply only when a consumer has previously been charged for insurance and that charge has thereafter been increased by the insurer. The phrase, "has previously been charged," as used by Hartford, refers not only to a rate that the consumer has previously paid for insurance but also to a rate that the consumer has previously been quoted, even if that rate was increased before the consumer made any payment. Reynolds disagrees, asserting that, under the ordinary definition of the term, an increase in a charge also occurs whenever an insurer charges a higher rate than it would otherwise have charged because of any factor— such as adverse credit information, age, or driving record[8] — regardless of whether the customer was

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[8] An adverse action under FCRA can, of course, only occur if the increase in charge was due to "information contained in a consumer report." 15 U.S.C. § 1681m(a). The consumer reports at issue in these cases are credit reports. While increases in charges may occur because of many factors, plaintiffs contest only the increases due to unfavorable credit information.

previously charged some other rate. According to Reynolds, he was charged an increased rate because of his credit rating when he was compelled to pay a rate higher than the premium rate because he failed to obtain a high insurance score. Thus, he argues, the definitions of "increase" and "charge" encompass the insurance companies' practice. Reynolds is correct.

[2] "Increase" means to make something greater. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) (defining "increase" as "growth, enlargement, etc[.]"). "Charge" means the price demanded for goods or services. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The price required or demanded for service rendered, or (less usually) for goods supplied."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("[T]he cost or price of an article, service, etc."). Nothing in the definition of these words implies that the term "increase in any charge for" should be limited to cases in which a company raises the rate that an individual has previously been charged.

[3] While no court has considered whether an increase requires a previous charge within the meaning of FCRA, the Sixth Circuit has employed the term "increase" in an analogous circumstance, stating, "An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers [the Truth in Lending Act's] disclosure requirements." *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001). Defined in this manner, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price.

Second, the statutory definition of "adverse action," as it is made applicable to insurance, explicitly encompasses "*any* insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). Congress' use of the latter phrase demonstrates its intent that "adverse actions" apply to all insurance transactions—from an initial policy of insurance to a renewal of a long-held policy. The text of the statute does not permit the imposition of any temporal limitation. Hartford has suggested no sensible alternative reading of "existing or applied for." Thus, reading the terms "increase" and "charge" in the context of the provision as a whole, particularly the "existing or applied for" phrase, supports affording them their ordinary meaning.

Third, our interpretation of the terms at issue best comports with the stated purpose of FCRA: to ensure the "[a]ccuracy and fairness of credit reporting." 15 U.S.C. § 1681. FCRA's adverse action notice requirement is an important tool that Congress created, using broad, encompassing language. Through this requirement, Congress sought to promote the rights of consumers by giving them essential information about how their credit report is used, information that they could obtain in no other way. The information Congress mandated serves two important ends. First and foremost, once consumers possess this information they can check and correct any errors in their credit reports. This increases the chances that a consumer's financial stability will not be hampered by faulty credit information. It also improves the overall accuracy of credit reports, which facilitates the operation of our markets. Second, even when credit reports are accurate, informing consumers when their credit rating is hurting them in the marketplace gives them important information about the benefits of improving their credit rating in the future and may even assist them in learning how to do so.

Hartford Fire's contention that FCRA does not apply to the rate charged in initial insurance policies would seriously

undermine Congress's clear purpose. The use of credit reports to help determine the rates to be charged for initial insurance policies is common. Moreover it is these policies that the economically unsophisticated are most likely to purchase. Congress did not create such strong protections for consumers only to render them inapplicable in so critical a circumstance. Furthermore, as FCRA is a consumer protection statute, we must construe it so as to further its objectives. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). While our interpretation is the plain one, this canon supports our result.

[4] We hold that whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA. Therefore, the fact that Reynolds' policy was an initial one, and his rate was the initial rate charged, is of no consequence. Reynolds' rate was increased above that which it would have otherwise been because of his credit report. As the statute's text is clear, we need not resort to either the agency's interpretations[9] or the statute's legislative history. The district court erred in granting summary judgment to Hartford Fire on the ground that FCRA does not apply to the rate first charged in an initial policy.[10]

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[9] We note that our holding is consistent with the Federal Trade Commission's interpretation of the statute. Because we find FCRA unambiguous, however, we reach our decision independently of, and do not defer to, the agency's interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

[10] Although our discussion has principally related to initial insurance policies, our interpretation of "increase in any charge" is obviously not limited to a consumer's first policy. As we have explained, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher

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B. What Constitutes An Adverse Action

The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.

[5] FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken

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price. This definition applies equally to initial issues, amendments, and renewals of insurance policies.

against him.[11] Such is the case with Edo. Because Edo would have been placed with GEICO General instead of GEICO Indemnity and thus would have been charged a lower rate if his credit rating had been higher, an adverse action occurred and an adverse action notice was required under FCRA.[12] Under the GEICO formula, the fact that the credit rating Edo actually received was higher than the average rating did not mean that Edo would not be charged a higher rate than he would have been charged had he had an even better credit report, but it ensured that he would not receive an adverse action notice when he was charged that increased rate. The district court erred in granting GEICO Indemnity summary judgment on the ground that Edo's rate was not increased on the basis of his credit report.

C. "No Hit" Adverse Actions

Hartford Fire makes a separate argument as to why in Reynolds' case no adverse action was taken. Specifically, the company argues that no adverse action was taken against

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[11] We note that the statute does not require an insurance company to issue an adverse action notice simply because a consumer does not get the best possible rate. If a better credit report would not have reduced the consumer's insurance rate, his credit report is not the cause of the higher price and therefore no adverse action based on a credit report has occurred.

[12] Making a slightly different argument, at least rhetorically, the GEICO Companies also argue that the action they took against Edo was not adverse because he was placed in the same company that he would have been placed in had his credit information not been used. While this is a true statement, it is only so because if the consumer refuses to allow his credit information to be used, the sales counselor assigns the consumer the "neutral" credit weight. Therefore, the GEICO Companies' argument that the action was not adverse because it was the same as if no credit information had been used is functionally identical to its argument that the action was not adverse because it was not detrimental when compared to the result using a "neutral" credit rating. Thus, this argument fails as well.

Reynolds "based in whole or in part on any information contained in a consumer report" within the meaning of 15 U.S.C. § 1681m(a). When Hartford Fire requested credit information about Reynolds, Trans Union did not possess the necessary information to generate an insurance score and transmitted this finding to the insurer. Reynolds was therefore considered a "no hit." *See* n.5, *supra*. Because he was so designated, Reynolds was rendered ineligible for the premium rates available to AARP members with qualifying credit ratings, and, as a result, was charged a higher rate in his initial policies. Hartford Fire argues, however, that these were not adverse actions because, it contends, an "adverse action" occurs only if it is based on "information contained in a consumer report" and no such report was received with respect to Reynolds. We reject Hartford Fire's argument.

[6] FCRA's definition of "consumer report" is broad. It unquestionably encompasses a credit reporting agency's communication to an insurance company that a consumer does not have enough information on file for an insurance score to be calculated. Specifically, 15 U.S.C. § 1681 a(d)(1) explains that "[t]he term 'consumer report' means any written, oral, or other communication of *any information* by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . ." (emphasis added). Reporting that an agency cannot obtain any information regarding a consumer or that a consumer has insufficient credit information on file conveys a message regarding the consumer's creditworthiness, standing, and capacity that makes his obtaining of credit far more difficult. Such a report suggests that the consumer cannot show that he pays debts in a timely manner. That information may be false: The credit agency may have used the wrong name or searched the wrong records, missing data that would have shown that the applicant is indeed creditworthy. Providing notice therefore serves the statutory purpose of allowing the consumer to correct errors in credit reports. Accordingly, we hold that a communication that a consumer has no

information available or an insufficient credit history to permit the calculation of a credit rating qualifies as "a consumer report" within the meaning of FCRA. Because it is uncontested that Reynolds would have been charged lower insurance rates had he received qualifying credit ratings and because the application of the "no hit" rule precluded him from receiving such ratings, we hold that an adverse action was taken against him on the basis of information contained in a credit report. Accordingly, the district court's order of summary judgment may not be affirmed on the ground that its actions with respect to Reynolds were not based on such information.

D. Adequacy Of The Notice

[7] Hartford Fire also urges us to affirm the district court's grant of summary judgment on the alternative ground that, although (in its view) it was not required under FCRA to send adverse action notices, the notices that the Hartford Companies did send were sufficient to meet its FCRA responsibilities. We reject this argument because the notices were inadequate as a matter of law. Under 15 U.S.C. § 1681m(a)(1), a company that takes adverse action on the basis of a consumer report must "provide oral, written, or electronic notice of the adverse action to the consumer" as well as meet a number of other specific requirements.[13] While the term "notice of an adverse action" is not defined in the statute, we hold that, at a minimum, such a notice must

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[13] The notice must also contain information regarding the consumer reporting agency. It it must provide the name, address, and telephone number of the agency that provided the report, a statement that the agency did not make the adverse decision and is not able to explain it to the consumer, a statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the agency, and a statement setting forth the consumer's right to dispute directly with the agency the accuracy or completeness of any information in the report. *See* 15 U.S.C. § 1681m(a)(2)-(3); 16 C.F.R. § 698, App. H.

communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.[14] *See Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir. 1983) (requiring disclosure of "reliance on data contained in [a consumer's] credit report" when providing notice of an adverse action).

The notices Reynolds received did not comply with any of the above requirements. They did not tell him that any adverse action had been taken against him. They simply stated that "[t]he Hartford's eligibility and pricing decisions are based in part on consumer report(s) from a consumer reporting agency" and allowed him to make a written request in order to find out more. Reynolds was entitled to be informed that his rate for insurance was increased because of information in his credit report. He was also entitled to be told that Hartford Fire made the pricing decision and that Hartford PCIC and Hartford Midwest issued him policies at those higher rates. FCRA recognizes the difference between telling a consumer that his credit information *could* affect his insurance rate and that it *did* adversely affect his rate, and requires notice of the latter. We therefore reject Hartford Fire's alternative argument for upholding the district court's order.

E. Who Is Liable

The defendants all contend that only one company can be liable when an insurance policy contains an increase in rates —the issuing company. The plain text of the statute, as well as its purposes, are to the contrary. Here, we hold that all of the defendants are potentially liable under the statute.

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[14] We do not decide whether a fuller description of what specific information was adverse is required as this question is not before us.

[8] FCRA requires that "any person" who takes an adverse action is liable. 15 U.S.C. § 1681m(a). The definition of "any" includes the plural. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("one, a, an, or some; one or more without specification or identification"). With regard to insurance transactions, liability attaches whenever an adverse action is taken "in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1) (B)(i). This broad "in connection with" language confirms that a variety of entities may be liable. No provision in the statute nor comment in the legislative history suggests that Congress intended that only a single company be responsible under FCRA when a consumer is charged an increased rate for insurance. Therefore, the defendants find themselves in the difficult position of persuading us that Congress intended something different from what it wrote. We analyze their three arguments separately.

First, GEICO argues that the words "applied for" in the definition of adverse action, § 1681a(k)(1)(B)(i), demonstrate that only the issuing company is liable under the statute. On that basis, GEICO asks us to hold that Edo "applied for" insurance only with GEICO Indemnity because that was the company that issued him a policy. The argument is frivolous, both factually and legally. As a matter of fact, Edo did not apply to one company but instead requested insurance from the GEICO family of companies. He did not specifically ask to be placed with GEICO Indemnity, and the GEICO Companies did not interpret his telephone call as requesting a policy with that company in particular, as evidenced by the evaluation by Government Employees of his eligibility for a policy from several of the GEICO affiliates. That he was placed with GEICO Indemnity and not another GEICO entity was the result of a decision made by Government Employees personnel, not the result of a limited application by Edo. Thus, GEICO's argument has no basis in fact. Furthermore, as a matter of law, we refuse to turn the words "applied for" into a legal term of art that refers only to the issuing company.

The clearest indication that Congress did not intend the words "applied for" to be used in such an unusual manner is that this interpretation would eliminate all potential FCRA liability for denials of insurance. No one disputes that FCRA defines the term adverse action to include denials. 15 U.S.C. § 1681a(k)(1)(B)(i). However, under GEICO's interpretation, because a consumer has not "applied for" insurance unless a policy has been issued and because a company that denies insurance has not, by definition, issued a policy, adverse action notices would never be required for denials of insurance. This is manifestly contrary to the statute, as it would eliminate from its coverage an important set of actions that Congress clearly intended to subject to FCRA's requirements.

Second, all the defendants argue that "*takes* any adverse action" limits FCRA's adverse action notice requirement to companies that actually issue an insurance policy. We find no such limitation in the statute by virtue of Congress's use of the word "takes" or otherwise. 15 U.S.C. § 1681m(a). To the contrary, adverse action is defined far more broadly than just "issuance." 15 U.S.C. § 1681a(k). The statutory definition specifically includes denials and cancellations as well as increases in rates, and other unfavorable changes, whenever and by whomever made. The word "takes" neither adds to nor detracts from that definition. It describes the act of engaging in the conduct that gives rise to the notice requirement. As discussed below, all of the companies at issue here took "adverse actions," as that term is defined in the statute.

Third and finally, all the defendants argue that we should hold liable only the issuing company because holding several companies liable for FCRA violations arising out of the issuance or denial of a single application will result in multiple, confusing adverse action notices, which would thwart rather than further FCRA's purpose. Such is not the case. Joint and several liability simply imposes the obligation

on all of the affiliated companies responsible for taking an adverse action to ensure that the affected consumer receives a statutory notice describing the adverse affect of his credit report within that family of companies. Multiple notices are not required; a single notice from the companies involved identifying those companies and their respective roles will suffice.

[9] Holding all the companies that take adverse action against a consumer jointly responsible for issuing a notice furthers FCRA's objectives. For example, joint responsibility substantially increases the prospect that an adverse action notice will be sent and that a customer who seeks to obtain insurance from a group of affiliated companies will be informed as to the manner in which his credit information adversely affected him. By imposing joint and several liability, Congress also improved the quality of information consumers receive, because each of the companies that takes an adverse action against the consumer must say so in the notice. We doubt that many consumers understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure. By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy.

[10] On the basis of the record before us all three GEICO Companies and Hartford Fire may be held liable under FCRA, as may the two other Hartford entities as to which leave to amend was denied.[15] Two of the GEICO

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[15] While the parties do not agree on every issue of fact, we hold that on the record before us there is no issue of material fact as to whether (1) Government Employees and Hartford Fire made the decisions that increased Edo's and Reynolds' rates, respectively, (2) GEICO General denied Edo a policy, and (3) GEICO Indemnity issued Edo a policy at an *(cont'd)*

Companies, working together, are responsible for increasing Edo's charge for insurance: Government Employees, which made the decision as to which of the GEICO family of companies would issue the insurance to Edo and, in so doing, determined that he would be charged at an increased rate, and GEICO Indemnity, which then issued the insurance policy at that increased rate. GEICO General is responsible because it denied Edo insurance for the reason that his credit rating was not sufficiently high. Hartford Fire, like Government Employees, made the critical rate-to-be-charged decision. It determined that, on the basis of Reynolds' credit report, he was not eligible for the lower rates afforded by its affiliates to the qualifying AARP members and that he would be charged for his insurance at a higher rate. Hartford Fire may therefore be held liable for increasing Reynolds' charges for insurance on the basis of his credit rating. Hartford PCIC and Hartford Midwest issued the policies to Reynolds at the increased rates determined by Hartford Fire, and may, accordingly, be held liable as well.

[11] In sum, Government Employees, GEICO General, and GEICO Indemnity may be held jointly and severally liable for failing to issue an adverse action notice to Edo. Likewise, Hartford Fire may be held liable for failing to issue a notice to Reynolds, and Reynolds may also properly state claims against Hartford PCIC and Hartford Midwest. Thus, Reynolds should be permitted to amend his claims on remand.

F. Meaning Of Willfully

Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must

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(cont'd from previous page)
increased rate. All of these actions were taken by the companies involved and all constituted "adverse actions" within the meaning of FCRA.

first define "willfully" as it appears in FCRA.[16] Interestingly, there is no legislative history to explain what Congress intended by the use of that term.

[12] We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." *See Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997). An act that is merely negligent is not willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) ("The word 'willful' is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."). Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive." *See, e.g., Dalton*, 257 F.3d at 418 (holding that a plaintiff need not show malice or evil motive); *Cousin*, 246 F.3d at 372 (same); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998); *Cushman*, 115 F.3d at 226 (same). *But see Duncan*, 149 F.3d at 429 (requiring "'a motivation to injure'"). In this respect, for purposes of willfulness we distinguish civil from criminal liability. *See Bryan v. United States*, 524 U.S. 184, 191 (1998) ("Most obviously [willfulness] differentiates between deliberate and unwitting

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[16] "Any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney's fees. 15 U.S.C. § 1681n (emphasis added).

conduct, but *in the criminal law* it also typically refers to a culpable state of mind." (emphasis added)).

[13] Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Cushman*, 115 F.3d at 227. We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (quoting *Thurston* and holding that, for an alleged civil violation of the Age Discrimination in Employment Act (ADEA), "willful" requires only a "'reckless disregard for the matter of whether its conduct was prohibited by the ADEA'"); *McLaughlin*, 486 U.S. at 134 n.13 (using the *Thurston* definition of "willful" in interpreting the Fair Labor Standards Act); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43 (1938) (holding civil defendant's failure to unload a cattle car was "willful" because it showed a disregard for governing statute and an indifference to its requirements). The Court's rule with respect to civil cases differs from its rule in criminal proceedings. In criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute. *See Bryan*, 524 U.S. at 196 (requiring "knowledge that the conduct is unlawful" in a criminal case); *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) (requiring proof that the criminal defendant "knew the structuring [of financial

transactions] in which he engaged was unlawful"); *Cheek v. United States*, 498 U.S. 192, 201 (1991) (requiring proof that a criminal "defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating").[17]

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing noncompliance even though the answer to a previously undecided question is objectively apparent and imposing liability notwithstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

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[17] The Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law. *Phillips*, 312 F.3d at 370 ("[W]ilful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law."). The Sixth Circuit has implied that actual knowledge is necessary. *Duncan*, 149 F.3d at 429 (suggesting that an actual belief of legality suffices to defeat willfulness liability under FCRA). The Eighth and Sixth Circuits, however, ignore *Thurston* and the cases that follow its reasoning.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless disregard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

[14] Where, as here, at least some of the interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive. *See Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 645 (9th Cir. 1993); *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 409 (5th Cir. 1989) (stating that "seeking legal advice [does not] ipso facto establish[ ] the appropriate intent [willfulness]"). Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel. Because the parties did not have an adequate opportunity to explore the issue in the district court, we remand for further proceedings.

III. CONCLUSION

In conclusion, we hold that FCRA applies, *inter alia*, to the first rates charged in initial insurance policies. We also hold that FCRA requires insurance companies to send adverse action notices whenever they charge a higher rate for insurance, in initial policies or otherwise, because of the consumer's credit information, not simply when the consumer's credit rating is below average. Furthermore, we hold that a communication that there is a lack of sufficient credit information regarding a consumer is a credit report within the meaning of FCRA. In addition, we hold that adverse action notices must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. With respect to which companies in a group may be liable under FCRA, we hold that a company that makes the rate-setting decision, a company that issues the insurance policy, and any company that denies insurance at a more favorable rate may be held jointly and severally liable, and that such companies may provide a single adverse action notice to consumers containing all of the requisite information. Finally, we adopt the Third Circuit's definition of "willfully": Reckless disregard is sufficient.

As a consequence of these rulings, we hold that the district court erred in granting summary judgment to Hartford Fire on the basis that increased charges for insurance in an initial policy do not constitute adverse actions, and in denying Reynold's request for leave to amend his complaint to add Hartford PCIC and Hartford Midwest for that same reason. Likewise, we hold that the district court erred in granting summary judgment to GEICO Indemnity on the basis that the actions it took were not adverse and granting summary judgment to Hartford Fire, Government Employees, and GEICO General on the basis that only the issuer of insurance can be liable under FCRA. Next, we hold that

summary judgment may not be granted on the alternative grounds that a transmission that a consumer has insufficient credit information to generate a score is not a credit report, or that Hartford Fire's adverse action notices were sufficient. In sum, we reverse the district court's grant of summary judgment with respect to all defendants in both *Edo* and *Reynolds*, reverse its denial of Reynolds' request to amend his complaint to add Hartford PCIC and Hartford Midwest, and remand to the district court for further proceedings consistent with this opinion.[18]

REVERSED and REMANDED.

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[18] We note that on appeal, plaintiffs seek only a reversal of the grant of summary judgment to defendants, and do not request such a judgment on their own behalf. Although "a court has the power sua sponte to grant summary judgment to a non-movant when there has been a motion but no cross-motion," we decline to do so here. *Kassbaum v. Steppenwolf Prod., Inc.*, 236 F.3d 487, 494 (9th Cir. 2000).

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED APRIL 20, 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULIE WILLES	No. 03-35848
Plaintiff-Appellant,	D.C. No. CV-01-01457-AJB
v.	District of Oregon, Portland
STATE FARM FIRE AND CASUALTY COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	ORDER
Defendant-Appellees,	
and	
MELISSA BOWMAN,	
Defendant.	

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

The panel has voted unanimously to deny Appellees' petition for rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge

has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and rehearing en banc is denied.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED JULY 31, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

JULIE WILLES and MELISSA BOWMAN,	:	CV 01-1457-BR
Plaintiffs,	:	OPINION AND ORDER
v.	:	
STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	:	
Defendants.	:	

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BROWN, Judge.

This matter comes before the Court on Defendant State Farm Fire and Casualty Company's (Fire and Casualty) Motion for Partial Summary Judgment (#84) as to the claim of Plaintiff Julie Willes[1] and Defendants' Motion to Strike Birnbaum and Wogalter Declarations (#110) from the summary judgment record. On July 29, 2003, the Court heard oral argument on these Motions.[2]

For the following reasons, the Court **GRANTS** Fire and Casualty's Motion for Summary Judgment and, therefore, **DISMISSES with prejudice** Willes's claims against Fire

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[1] On August 27, 2002, the Court dismissed Plaintiff Melissa Bowman's claims against both Defendants.

[2] The Court also heard oral argument on Defendant State Farm Mutual Automobile insurance Company's Motion for Partial Summary Judgment. During oral argument, the Court took under advisement Mutual's Motion for Partial Summary Judgment and that portion of Defendants' joint Motion to Strike that pertains to the record on Mutual's Motion for Partial Summary Judgment. The Court will address those Motions in a separate Opinion and Order to be issued in due course.

and Casualty. The Court also **DENIES as moot** Defendants' Motion to Strike to the extent that Motion relates to Fire and Casualty's Motion for Partial Summary Judgment.

DISCUSSION

A. Fire and Casualty's Motion for Partial Summary Judgment

In Plaintiffs' Third Amended Complaint, Willes alleges Fire and Casualty took adverse actions with respect to Plaintiff Willes and all those similarly situated based on information contained in consumer reports and failed to provide them with adequate notification of those adverse actions as required by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681. In particular, Willes asserts Fire and Casualty took adverse actions when it initially wrote Willes's three automobile insurance policies on less favorable terms than otherwise were available to persons with better credit histories. Willes further asserts Fire and Casualty increased the charge for her insurance or unfavorably or adversely changed the terms of her insurance because Fire and Casualty is a standard insurance company that offers less favorable terms and rates that are "generally" higher than its affiliated, preferred insurance company, Mutual.

Willes's claims are based solely on Fire and Casualty's initial setting of her premium rates. This Court previously concluded an insurer cannot "increase" a charge for insurance unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report. *See Mark v. Valley Ins. Co.*, CV 01-1575-BR (J. Brown) (issued July 10, 2003). The Court similarly concludes an insurer cannot "reduce" or "unfavorably or adversely change" the terms of insurance unless such terms previously existed and the insurer subsequently alters those terms in an unfavorable manner. Based on this Court's

decision and analysis *Mark*, the Court concludes Fire and Casualty is entitled summary judgment as to Willes's FCRA claim because the initial setting of her insurance premiums did not constitute "adverse actions" under FCRA.[3]

B. Defendants' Motion to Strike Birnbaum and Wogalter Declarations

In support of her Opposition to Fire & Casualty's Motion for Summary Judgment, Willes filed the Declarations of proposed expert witnesses Michael S. Wogalter and Birny Birnbaum. To the extent the declarations contain legal arguments or suggest interpretations of the plain meaning of FCRA, the Court concludes the proposed expert affidavits do not contain material that is the proper subject of expert testimony. The Court, therefore, did not consider that testimony. To the extent the declarations contain some factual information, none of that information is relevant to the issue decided by the Court, and, therefore, the Court did not consider that testimony when deciding Fire and Casualty's Motion for Partial Summary Judgment. Accordingly, the Court denies as moot that portion of the Motion to Strike that relates to Fire & Casualty's Motion for Partial Summary Judgment.

CONCLUSION

For these reasons, the Court **GRANTS** Fire and Casualty's Motion for Partial Summary Judgment (#84) and, therefore, **DISMISSES with prejudice** Willes's claims against Fire and Casualty. The Court also **DENIES as moot** Defendants' Motion to Strike Birnbaum and Wogalter Declarations (#110) to the extent that Motion relates to Fire and Casualty's Motion for Partial Summary Judgment.

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[3] The Court does not reach the additional arguments in support of Fire and Casualty's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

DATED this 31st day of July, 2003.

/s/Anna J. Brown
ANNA J. BROWN
United States District Judge

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED SEPTEMBER 9, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

JULIE WILLES and MELISSA BOWMAN,	:	**CV 01-1457-BR**
Plaintiffs,	:	**OPINION AND ORDER**
v.	:	
STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	:	
Defendants.	:	

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BROWN, Judge.

This matter comes before the Court on Defendant State Farm Mutual Automobile Insurance Company's (Mutual) Motion for Partial Summary Judgment (#82) on the claim of Plaintiff Julie Willes [1] and Mutual's Motion to Strike Birnbaum and Wogalter Declarations (#110). On July 29, 2003, the Court heard oral argument on these motions.

On the same date, the Court also heard oral argument on Defendant State Farm Fire and Casualty Company's (Fire & Casualty) Motion for Partial Summary Judgment. After oral argument, the Court took under advisement Mutual's Motion for Partial Summary Judgment and the portion of Defendants' joint Motion to Strike Birnbaum and Wogalter Declarations that pertains to Mutual's Motion for Partial Summary Judgment. The Court issued its Opinion and Order granting Fire & Casualty's Motion for Partial Summary Judgment on July 31, 2003.

For the following reasons, the Court **GRANTS** Mutual's Motion for Partial Summary Judgment and, therefore,

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[1] On August 1, 2003, the Court dismissed Plaintiff Melissa Bowman's claims against both Defendants.

DISMISSES Willes's claims against Mutual. The Court also **DENIES as moot** Mutual's Motion to Strike.

MUTUAL'S MOTION FOR SUMMARY JUDGMENT

Standards

I. Summary Judgment.

Fed. R. Civ. P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). In response to a properly-supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarmo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must draw all reasonable inferences in favor of the nonmoving party. *Id.* A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990). When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required. *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998) (citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. *Addisu v. Fred Meyer, Inc.*, 198 F. 3d 1130, 1134 (9th Cir. 2000). If the resolution of a factual dispute would not affect the outcome of the claim,

the court may grant summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

II. Statutory Construction

When a district court interprets a federal statute, it must apply a two-part analysis. "The first and most important step in construing a statute is the statutory language itself." *Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001) (citing *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984)). The court must look to the text of the statute to "'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

"The meaning - or ambiguity - of certain words or phrases may only become evident when placed in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Accordingly, it is a "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.* at 133 (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). A court, therefore, must "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *Food and Drug Admin.*, 529 U.S. at 133 (internal quotations and citations omitted).

If the congressional intent is clear from the plain meaning of the statute, the court need not look any further for guidance. *Id.* If the statute is ambiguous, however, the court must proceed to the second step and determine the meaning of the statutory language by giving deference to the governing agency's interpretation as long as that interpretation is permissible. *Id.* at 132. If there is no agency

interpretation and the text of the statute is ambiguous, the court may look to legislative history as an aid to discern congressional intent. *In re Bankr. Estate of MarkAir, Inc.*, 308 F.3d 1038, 1043 (9th Cir. 2002).

III. Fair Credit Reporting Act (FCRA).

Congress enacted FCRA for the stated purpose of requiring credit reporting agencies to adopt "reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b). Although FCRA generally regulates credit reporting agencies, it also creates obligations for certain users of consumer credit information. In particular, 15 U.S.C. § 1681m(a) provides: "[I]f a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer."

FCRA defines "adverse action" in relevant part as follows:

> The term "adverse action" -
>
> (A) has the same meaning as in section 1691(d) (6)[2] of this title; and

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[2] 15 U.S.C. § 1691(d)(6) is part of the Equal Credit Opportunity Act (ECOA). That section provides:

[T]he term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an

(cont'd)

(B) means -

(i) a denial or cancellation of, an increase in any charge of, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

Facts

As best the Court can discern from the parties' statements of concise facts and their statements in oral argument, the following material facts are undisputed.

On August 1, 2001, Willes contacted a State Farm insurance agent to obtain a quote for automobile insurance. The agent then conducted a field underwriting interview with Willes. Willes told the agent she hoped to obtain the best coverage available under a State Farm policy. In response to questions from the agent, Willes disclosed she had received a speeding ticket within the preceding 36 months. After the field underwriting interview, the agent prepared and submitted quotes for automobile insurance to Fire & Casualty, which, in turn, responded to Willes through the agent with a quote for such insurance. The agent did not submit a quote to Mutual because she knew Willes would not be eligible for a Mutual policy because of the speeding ticket unless she qualified as an exception under State Farm's general automobile underwriting guidelines. When she

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existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

received the quote, Willes applied for insurance with Fire & Casualty.

The agent then accessed an internet on-line Agents Underwriting Information (AUI) system that provides loss-history reports, undisclosed driver reports, and an underwriting score algorithm that weighs other information pertaining to an applicant for insurance, including a consumer credit report. When a potential insured is ineligible for a policy issued by Mutual and the agent accesses AUI's system regarding the potential insured, AUI issues a return message to the agent indicating whether the potential insured qualifies for an exception based on the underwriting score generated by AUI. If the underwriting score is not high enough to qualify for an exception, AUI transmits a message stating "Bind in Standard only, if otherwise Eligible for Standard Program." The agent does not have the authority to quote coverage with Mutual unless AUI returns a message that indicates an exception can be made. Although the factual record presented by the parties lacks clarity on this fundamental point, the Court assumes for purposes of Mutual's Motion that, because of Willes's credit history, the underwriting score generated by AUI for Willes was too low to justify an exception that would permit placement of her insurance with Mutual.

Willes's Claim.

In her Third Amended Complaint, Willes alleges both Fire & Casualty and Mutual took adverse actions with respect to her and all potential class members similarly situated based on information contained in consumer credit reports and failed to provide them with adequate notification of those adverse actions as required by the FCRA, 15 U.S.C. § 1681.

Below is a summary of differences between Willes's claims against Defendants Fire & Casualty and Mutual.

1. Claim against Fire & Casualty.

Willes asserted Fire & Casualty took adverse action against her when it initially wrote her three automobile insurance policies on less favorable terms than otherwise were available to persons with better credit histories. Willes further asserted Fire & Casualty increased the charge for or unfavorably or adversely changed the terms of her insurance because Fire & Casualty is a standard insurance company that offers less favorable terms and rates than Mutual, its affiliated insurance company. Accordingly, Willes's claims against Fire & Casualty were based solely on Fire & Casualty's initial setting of her premium rates.

This Court previously concluded an insurer cannot "increase" a charge for insurance unless the insurer makes an initial demand to the insured for payment and subsequently increases the amount of that demand based on information in the insured's consumer credit report. *See Mark v. Valley Ins. Co.*, CV 01-1575-BR (J. Brown)(July 10, 2003). In its Opinion and Order granting Defendant Fire & Casualty's Motion for Partial Summary Judgment, the Court similarly concluded an insurer cannot "reduce" or "unfavorably or adversely change" the terms of insurance unless such terms previously existed and the insurer subsequently altered those terms in an unfavorable manner. Based on its decision and analysis in Mark, the Court concluded Fire & Casualty was entitled to summary judgment on Willes's FCRA claim because the initial setting of her insurance premiums did not constitute "adverse actions" under FCRA.

2. Claim against Mutual.

Willes asserted she applied for and was denied an automobile insurance policy with Mutual because of

information relating to her credit history contained in a consumer credit report. Mutual's alleged adverse action was the denial of Willes's alleged application for Mutual's preferred policy, which would have been at lower premium rates than the policies ultimately issued to Willes by Fire & Casualty.

Discussion

The threshold issue before the Court is whether Willes applied for automobile insurance with Mutual. If so, issues of fact and law exist as to whether (1) Mutual took adverse action by denying Willes's application because of her credit history, and (2) whether Mutual gave Willes adequate notice of such adverse action under FCRA.

Mutual contends Willes did not ask for nor apply specifically for automobile insurance with Mutual, but merely asked a State Farm agent for the best coverage available in a State Farm policy. After Willes disclosed she had a speeding violation, the agent knew Willes was ineligible for a Mutual policy. In light of the disclosed speeding violation, the State Farm computer system in effect at the time permitted the agent to submit a request for a quote on a Fire & Casualty policy, but not on a Mutual policy. On receipt of the quote from Fire & Casualty, Willes signed a separate "Application for State Farm Fire and Casualty Insurance" for each of three vehicles she owned. Willes did not apply for a Mutual policy because she was not eligible for such a policy.

Willes asserts Mutual's view of the "application process" is too narrow. Willes contends:

> During the application process, after the "field underwriting interview," State Farm Mutual made a determination about whether plaintiff

> could receive a State Farm Mutual policy. State Farm Mutual determined that plaintiff could not receive a State Farm Mutual policy. That determination directly resulted in an action of denial by State Farm Mutual and the issuing of policies with State Farm Fire. That action was based, in part, on plaintiff's credit score.

Pl.'s Resp. Mem. at 6. Willes characterizes the application process as one in which the agent "submitted her [qualifying] information to the AUI system . . . to determine whether plaintiff should be written in State Farm Mutual or State Farm Fire. An application was made to both companies."

After considering the parties' arguments and after reviewing the facts in the light most favorable to Willes, the Court finds Willes made only one application for insurance, and that application was directed to Fire & Casualty. The State Farm agent who Willes contacted made the initial determination, without regard to credit history, that Willes did not qualify for the Mutual policy because of her driving record. The agent submitted a request for a quote to Fire & Casualty only. Fire & Casualty responded with a quote. Willes then submitted applications on each of her automobiles to Fire & Casualty. Mutual, via the AUI, could have created an exception to Mutual's underwriting guidelines during the pre-application process depending on Willes's credit score. At the time the AUI system indicated Mutual would not make an exception in Willes's case, however, Willes had not requested insurance with Mutual and the State Farm agent had requested a quote from Fire & Casualty only.

Willes cites the definition of "application" from *Black's Law Dictionary* as, *inter alia*, "[t]he act of making a request for something." *Black's Law Dictionary* 98-99 (6th ed. 1990). Although the Court assumes Willes told the agent she hoped

to obtain the best coverage available under any State Farm policy, the State Farm agent's request for insurance quotes and Willes's applications were made to Fire & Casualty only because of Willes's disqualifying speeding ticket. Willes's hope to obtain the best coverage available is too generic to be an "application" for insurance with Mutual.

The Court, therefore, concludes Willes did not apply for and was not denied insurance coverage by Mutual within the meaning of FCRA, 15 U.S.C. § 1681a(k)(1)(b)(i).

MUTUAL'S MOTION TO STRIKE BIRNBAUM AND WOGALTER DECLARATIONS

In light of the Court's ruling on Mutual's Motion for Partial Summary Judgment, Mutual's Motion to Strike is moot.

CONCLUSION

For these reasons, the Court **GRANTS** Mutual's Motion for Partial Summary Judgment (#82) and, therefore, **DISMISSES with prejudice** Willes's claims against Mutual. The Court also **DENIES as moot** Defendants' joint Motion to Strike Birnbaum and Wogalter Declarations (#110) to the extent that Motion relates to Mutual's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

DATED this 9th day of September, 2003.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge